

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 SUPERIOR COURT
 YAVAPAI COUNTY, ARIZONA
 FOR THE COUNTY OF YAVAPAI

✓ 2011 DEC 29 AM 8:29

SANDRA K HARKHAM, CLERK

Stephanie Kling

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY

APRIL 8, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant)
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1 Proceedings had before the Honorable

2 WARREN R. DARROW, Judge, taken on Friday, April 8,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

1 THE COURT: We're on the record. The
2 defendant, Mr. Ray, is present. The attorneys are
3 present.

4 And I wanted to talk a bit about legal
5 matters, particularly this 404(b) issue. That's
6 what I'll call it. I do have the proposed
7 instructions. I'll talk a bit about that.
8 Although I'm not going to be giving it at the start
9 of the day. But I think instructions should be
10 given today regarding that.

11 But I --

12 Mr. Hughes, I have some questions -- I'll
13 ask both counsel.

14 And, Mr. Kelly, I guess you're going to
15 be addressing this for the defense, or Mr. Li?

16 MR. KELLY: Mr. Li is.

17 THE COURT: Thank you.

18 I recall that this ruling of the Court
19 actually stemmed from March 1st. Isn't that
20 correct?

21 MR. HUGHES: That's the state's understanding,
22 Your Honor.

23 THE COURT: And I noticed when I got the
24 motion for reconsideration, it started with
25

1 attachments on the 9th, which is actually eight
2 days after the initial ruling that said that
3 evidence for causation purposes would be permitted.
4 I want to make sure that that's the case.

5 Does anybody have that March 1st
6 transcript? Because it was not provided with the
7 motion for reconsideration.

8 MR. HUGHES: Your Honor, we've ordered that
9 transcript, but I --

10 THE COURT: I'm aware of that. And that's one
11 you've ordered. I mean, Ms. Hunt told me you had
12 ordered the transcripts.

13 MR. HUGHES: We have. I don't think I've seen
14 the March 1st one yet. I think she may still be
15 working on that.

16 THE COURT: Okay. So the -- the point is
17 this: This is not some new ruling. I don't know
18 where that notion came about. It's not.

19 And there has not been any real challenge
20 to that ruling until the motion for -- well, when
21 the testimony came up with Mr. Mercer. That's, I
22 think, an important aspect of chronology.

23 With regard to the instructions, we can
24 talk a few minutes about that. Because I do think
25 it's important that a limiting instruction go to

1 the jury today sometime.

2 But there's another matter I want to
3 comment too. And this goes to a concern that
4 Mr. Kelly brought up. In light of the testimony
5 yesterday, Mr. Hughes, I don't see that there would
6 be much need to have witnesses from other sweat
7 lodge ceremonies. The matter was covered in far
8 more detail -- far more detail than I had
9 anticipated.

10 And Mr. Kelly had brought up -- asked for
11 some guidance about what about future witnesses.
12 And you mentioned the possibility of 15. And all I
13 could say is not cumulative. At this point it
14 would seem that almost any additional witness could
15 be cumulative.

16 MR. HUGHES: Your Honor, I think with any
17 witness, I think when you have testimony from one
18 witness, it's fair to have testimony that
19 corroborates that from at least one other witness,
20 Your Honor, before I think even the cumulative
21 specter raises its head. Otherwise the jury can
22 reject a witness's testimony based on either the
23 jury's consideration the witness may not recall
24 correctly or might have a bias.

25 So I think that cumulative would not

1 raise its head until at least after testimony by a
2 second witness or even a third witness. If the
3 defense were to stipulate to certain facts, then
4 that would be less of an issue. But without --
5 without that the jury may reject some or all of
6 what Mr. Mercer said happened in prior years.

7 In addition, Mr. Mercer only talked about
8 '07 and '08. And I think for purposes of showing
9 the causation pattern, it would be appropriate to
10 have witnesses talk about '05 and '06.

11 We have been talking, and the prosecution
12 team, about exactly what witnesses we're going to
13 be calling for those purposes. And we are cutting
14 down the list quite a bit. We are going to ask --
15 or plan to ask Mrs. Mercer, who's testifying today,
16 some of the similar questions about prior years, I
17 believe '07 and '08.

18 But, Your Honor, to cut short testimony
19 on a relevant subject after only one witness has
20 testified on the basis of cumulative, I think,
21 would be improper merely because the jury needs to
22 have something to gauge whether that testimony is
23 accurate or not.

24 THE COURT: And I probably wasn't clear
25 enough. I was anticipating that this witness, the

1 next witness, would be going to this as well. But
2 that would actually make three witnesses that have
3 discussed this area. And I don't think it's
4 particularly contested matters.

5 It's -- the problem has been, in my view,
6 largely the characterization. And I have a real
7 concern in bringing in a lot of witnesses. What
8 really can be conveyed there is an attempt to
9 suggest propensity, not the specific factual issue
10 that I found admissible with regard to causation
11 back on March 1st when I made that determination.

12 Another thing I want to say about the
13 witnesses too are the types of witnesses. I'm
14 going to use the term "Terrazas qualified." The
15 Mercers are essentially -- I've never heard that
16 term before, but I think the attorneys know what I
17 mean by that. They were at the 404(b) hearing. I
18 made findings of clear and convincing evidence with
19 regard to however I characterized them in the
20 order -- unusual physical and mental health
21 effects, that type of thing. They went through
22 the Terrazas process, and I made those findings.
23 Other people have not.

24 So to the extent 404(b) is the basis for
25 admissibility, that's an important consideration.

1 MR. HUGHES: And, Your Honor, I agree.
2 Although, again, the state is not offering the
3 evidence to prove a trait of character.

4 Ms. Hamilton is scheduled to testify next
5 week. I believe she has some information about the
6 2005 incident. She went through the 404 hearing
7 that occurred last year as well. But as of this
8 point, there has been no testimony, for example,
9 about the 2005.

10 It's not the state's intent to bring
11 three or four or five witnesses about '05 or '06.
12 But I do think that it would be appropriate for
13 Ms. Hamilton, for example, to testify about the
14 '05. I believe she has some information about the
15 '07 incident as well. And it would be appropriate
16 for her to testify about that.

17 If at that point the Court concludes that
18 there's been enough testimony, for example, about
19 '07 -- about the '07 event, by then the jury will
20 have heard about '07 from Mr. Mercer, Mrs. Mercer
21 today and then Ms. Hamilton next week. Obviously
22 we'll respect the Court's ruling at that point
23 regarding particular years.

24 But each year, I think, needs to be
25 looked at separately because there were events in

1 each of the separate years. And the fact that this
2 pattern bears out year after year after year, I
3 think, makes the pattern more relevant, which would
4 fall under the definition of "relevant evidence."

5 So it would be appropriate for the state
6 to talk about the '05, which the jury hasn't heard
7 about, and to allow Mrs. Mercer today to talk about
8 the '07 and '08, which she has knowledge of. She
9 doesn't have knowledge, as far as we know, about
10 years prior to '07.

11 THE COURT: I just think we're getting close
12 to being cumulative already.

13 Mr. Kelly.

14 MR. KELLY: Judge, I'll cut right to the
15 chase. I would move to preclude any reference to
16 sweat lodge events in 2007 and 2008 if it's
17 proffered by Debbie Mercer today on the basis that
18 it's cumulative. Listening to Mr. Hughes, he said,
19 well, it's going to be similar to Mr. Mercer's by
20 definition. That's cumulative.

21 Secondly, under 403 any proffered
22 relevance is of minimal probative value and, as we
23 saw yesterday, has the potential of a great deal of
24 prejudice. And as set forth in the defense's
25 limiting instruction attempting to contain that

1 prejudice, it presents significant legal problems.

2 So before Ms. Mercer takes the stand,
3 Judge, I would move to preclude any reference to
4 any event other than October of 2009 from
5 Ms. Mercer.

6 MR. HUGHES: Your Honor, again, on that end,
7 one, when you have testimony from one witness, it
8 does not become cumulative when another witness
9 provides testimony to corroborate the first
10 witness. What becomes cumulative is when you have
11 multiple witnesses down the road talking about the
12 same thing.

13 We were very careful in our case in chief
14 yesterday to go into very specific limited aspects
15 of what happened in '07 and '08. If the Court
16 recalls, it was during the cross-examination that a
17 whole host of the photographs were brought out and
18 there were questions about all sorts of other
19 things, which really threw the barn doors wide open
20 at that point in time.

21 But in our direct yesterday we were very
22 narrow and very careful to bring out only limited
23 information from Mr. Mercer.

24 THE COURT: And I understand what you're
25 saying. And I also understand the defense's

1 approach. And that's -- people make those
2 decisions.

3 I want to say something about prejudice.
4 I mentioned this before. I think Mr. Li was the
5 one that brought up the 403 aspect. And I have
6 thought a great deal about that and the talk of
7 prejudice in light of the evidence.

8 And I'm not commenting on the evidence,
9 but the nature of the evidence that's been
10 presented with regard to 2009, with regard to
11 excerpts that were -- that were played, two to
12 three excerpts of recordings from Mr. Ray that were
13 played to the jury during opening, and then one was
14 played later. To consider what's been stated is
15 prejudicial, especially at this point.

16 I do not find that it's prejudicial in
17 light of the overall context. However, Mr. Hughes,
18 at some point when it becomes a repetition, a
19 repetition, it crosses over. And it's not offered
20 anymore really for that limited purpose that is
21 either acceptable under 404(b) or is offered for --

22 And when I say a non404(b) purpose,
23 that's what can get confusing. Are you talking
24 about it being a nonpropensity purpose or -- so I
25 don't think that's a clear enough term to use, as

1 I've indicated.

2 But when it's offered for something that
3 doesn't relate to 404(b), there's a basis for it
4 that doesn't require a 404(b) analysis -- I looked
5 at cases on that recently -- then that's a whole
6 separate -- a whole separate question too.

7 Mr. Kelly, you wanted to say something.

8 MR. KELLY: Judge, in regards to potential
9 prejudice, I would submit that it is perhaps more
10 complicated than simply referring to the references
11 made in the opening statements by both sides.

12 And the examples I provide are the
13 reference to Native American culture, the
14 comparison between sweat lodges, between other
15 events and JRI events.

16 I see a significant issue given Dr. Lyon
17 and Dr. Cutshall's testimony when they talk about a
18 continuum of heat between heat exhaustion and heat
19 stroke. They're speaking of a physiological
20 phenomenon, not an environmental phenomenon, which
21 that physiological condition is specific to the
22 individual.

23 And, of course, that was born out in
24 Mr. Li's cross-examination when necessarily he was
25 presented with the most difficult choice of --

1 given your rulings, as we understood them, Judge,
2 that you were going to allow the state limited --
3 with a great deal of caution, limited presentation
4 of prior incidents.

5 In our strategy we were left with a
6 choice of what do we do now. Since by the end
7 of -- I believe it was Wednesday afternoon the jury
8 was left with an implication that the prior sweat
9 lodges, of which Mr. Mercer had attended -- left in
10 the minds of the jury of these horrible events,
11 which necessitated Mr. Li, then, admitting
12 photographs that we previously objected to.

13 And then -- and I take issue with
14 Mr. Hughes on redirect. And we filed the day prior
15 to yesterday. And beginning with Melissa Phillips'
16 redirect examination, I asked the Court to caution
17 the state from using a continued series of leading
18 questions on redirect. Yesterday afternoon
19 Ms. Polk went through a series of leading questions
20 on redirect, such as, did you see any vomiting
21 in 2008? Did you see anyone unconscious in 2008?

22 THE COURT: I don't think you were at the
23 bench conference, Mr. Kelly. Because that was done
24 as a result of getting a characterization. So if
25 you weren't at the bench conference, you don't have

1 a ground to be discussing that.

2 MR. KELLY: I was at the bench conference.

3 THE COURT: No. Because what --

4 MR. KELLY: Judge --

5 THE COURT: I need to address that, Mr. Kelly.
6 I need to address that. Because terms were coming
7 up like, did you see sick people? What does that
8 mean? Look at the instructions and the physical
9 effects that are anticipated. Is it sick? That
10 means -- can mean anything. And I have a problem
11 when you talk about medical distress and sickness.

12 So at the bench conference there was
13 really the instruction that be specific as to what
14 the actual observations were. So that's where that
15 came from and -- I believe. If you're talking
16 about that series of leading questions by Ms. Polk,
17 I think that's where that derived from.

18 MS. POLK: Yes, Your Honor. It was actually
19 the Court's direction and counsel --

20 THE COURT: And Mr. Li --

21 MS. POLK: -- requested it.

22 THE COURT: Yes. Mr. Li requested it be in
23 that fashion, Mr. Kelly.

24 MR. KELLY: Judge, my point is in regards to
25 403, one has to consider the cumulative nature of

1 the state's presentation on these issues.

2 THE COURT: That's what I said.

3 MR. KELLY: And beginning with Ms. Phillips,
4 the very first witness, I asked for a cautionary
5 instruction from the Court to prevent the state
6 from improperly asking questions on redirect
7 examination, what has, our perspective, placed the
8 defense in the untenable position of having to
9 object in front of this jury repeatedly. Given
10 that, we filed a motion for prosecutorial
11 misconduct.

12 THE COURT: And we're not going to discuss
13 that, Mr. Kelly.

14 MR. KELLY: And what we're asking for, Judge,
15 is direction from the Court. We're asking for the
16 Court to admonish the State of Arizona to follow
17 the rules of evidence. Because many times the form
18 of the question, not the answer, is leaving an
19 impression in the jury's mind potentially which is
20 highly prejudicial to Mr. Ray. That's my point.

21 And if you take the sum total of this
22 information, whether it is what we call "back
23 dooring in 404(b)," improper character evidence;
24 the caution from the Court that any reference to
25 prior-act evidence should relate solely, in a very

1 limited fashion, to causation, the actual causation
2 as it relates to physiology, and not environmental
3 temperatures, the comparison with Native American
4 ceremonies, and then the repeated use of leading
5 questions on redirect, improper foundation on
6 direct and redirect -- the sum total of that is
7 presenting, in our mind, a great deal of prejudice
8 to our client.

9 And so we're asking for direction of the
10 Court. And I believe it's the Poole case from 1984
11 that emphasizes that -- you know -- there has to be
12 some orderly fashion and an impartial manner in
13 which the trial is conducted out of fairness to the
14 person charged with the alleged crime. And that's
15 what we're asking, Judge.

16 So I realize -- and I apologize for
17 getting off track this morning. Our request was
18 that the -- under 105 that the limiting instruction
19 be read to this jury before the next witness's
20 testimony. And, again, I would move to preclude
21 any additional testimony from Debbie Mercer in
22 regards to 2007, 2008.

23 Thank you.

24 THE COURT: Well, I just want to address that.
25 The photographs were brought in by the defense.

1 Some of them were taken by Debbie Mercer. There
2 was a lot of questioning about that. And we're
3 certainly at a point where there should not be a
4 great deal of testimony in this area about any
5 prior sweat lodges. I agree. I'll be attuned to
6 that.

7 But no. There can be -- that area has to
8 be -- well, it doesn't have to be. It may be
9 discussed if the state chooses to do that.

10 With regard to leading questions,
11 Mr. Kelly, I'll say this: I think the state
12 sometimes has chosen not to object, but there have
13 been a number of questions that have been presented
14 to the witnesses in a form that suggests knowledge
15 and then confirmation of knowledge rather than
16 really asking a question. The state has chosen not
17 to object. And I'll just note that.

18 I will certainly encourage, again, when
19 questions are asked of witnesses, especially in
20 these areas where there's not going to be a retrial
21 of prior sweat lodges -- and because of that
22 sometimes there's necessarily a leading nature to a
23 question so it doesn't just go anywhere.

24 But the questions need to be phrased with
25 602 in mind. Is this witness really going to know

1 something? Is there going to be a question thrown
2 out there that leads anywhere despite the basis of
3 knowledge? Or is there going to be a leading
4 question that really plants the seed as to -- you
5 know -- what a person might be drawn to as opposed
6 to just saying this is really an observation that
7 the person really has observed?

8 But we can only spend a few minutes. I
9 know -- in terms of reading the instructions -- I
10 got them just this morning. I've looked at them
11 both, and they're far different in nature.

12 The Rule 105 requires a reading upon
13 request, and there's a request made and a specific
14 instruction provided.

15 So, Mr. Hughes, I think the defense has
16 requested it, and I think you should respond, if
17 you would, please, if you're going to address it.

18 MR. HUGHES: Thank you, Your Honor.

19 Rule 105 does require a limiting
20 instruction upon request. It doesn't require a
21 limiting instruction as drafted by the defendant.
22 105 does say that the Court shall restrict the
23 evidence to its proper scope and instruct the jury
24 accordingly.

25 The defendant's proposed limiting

1 instruction, the first section, first of all, is
2 confusing. It is referring to an evidentiary
3 ruling the Court made at a hearing that took place
4 outside the presence of the jury. But it appears
5 to be a comment on the evidence that's been
6 presented here in court. It's confusing. It
7 invades the province of the jury as far as
8 determining the weight that evidence that they've
9 heard in this court should be given.

10 With respect to 105, 105 talks about
11 limiting evidence in scope. And to do that, really
12 the instruction needs to limit the scope and not
13 explain the background. Although I think a little
14 bit of background -- for example, in the state's
15 proposed instruction, we included the evidence is
16 relevant only for limited purposes.

17 So you can give the jury a little
18 background. But the first paragraph of the
19 defendant's proposed instruction is confusing
20 because it's referring to an evidentiary hearing
21 that the jury doesn't know about, but it appears
22 and would appear to jurors to be referring or
23 commenting on evidence in this case.

24 With respect to the second part of the
25 defendant's proposed instruction, the second

1 paragraph, it goes far beyond the scope that 105
2 would permit, which is the proper scope of the
3 evidence.

4 The Court has ruled that the prior sweat
5 lodge evidence can come in to -- on the issue of
6 causation, why the victims died. And that's
7 appropriate. And the jury should be instructed
8 that. Really it should end appropriately right
9 there.

10 The defense wanted the other side in
11 their instruction and -- as far as what they can't
12 consider it for. And the Court has ruled that we
13 cannot use that evidence for 404(b) purposes.
14 404(b) is character evidence. And it starts out --
15 that's precisely what 404(b) says. It cannot be
16 used to prove the character of a person. And
17 that's what the jury cannot use that evidence for.

18 But, for example, to say that the jury
19 can't consider how Mr. Ray acted, I think, ignores
20 that and -- in prior years. That ignores his role
21 in the past, in prior years. And that's not
22 evidence of his propensity. It's evidence that
23 there's a pattern. And you have to look at that
24 pattern. You look at how other sweat lodges at
25 Angel Valley -- how did they act and how did

1 Mr. Ray act.

2 It's the act, the testimony is, of the
3 pourer of controlling the heat, controlling the
4 amount of humidity, controlling the length. That's
5 what leads to the causation. So, for example, to
6 say that they can't consider it to determine how he
7 acted on those prior occasions not only misstates
8 the evidence but it --

9 THE COURT: You know -- I -- what do you mean
10 how he acted? Why -- you're saying it can be used
11 to -- how he acted in terms of characterizing as
12 improper conduct?

13 MR. HUGHES: The jury -- the defense has asked
14 in the instruction that they can't use that
15 evidence or consider how Mr. Ray may have acted or
16 what his conduct was in the past. The reason this
17 evidence is relevant is it does show a pattern
18 which establishes causation.

19 And the pattern is that the pourer
20 controls the heat. The pourer controls the length
21 of the session. The pourer controls how many rocks
22 come in. Those are all acts, the controlling of
23 the length of the session.

24 The proposed instruction informs the jury
25 they can't consider that. And then that would

1 leave this pattern meaningless because the pattern
2 then would -- the pattern shows or is based upon
3 the fact that the pourer, who's in charge of the
4 ceremony, controls the outcome of the conditions
5 inside that sweat lodge as far as causation.

6 THE COURT: Mr. Li.

7 MR. LI: Your Honor, I think it's critical to
8 note that when we first -- first of all, the Court
9 is correct. It did mention the causation issue in
10 March, on March 1st. And our papers noted that.
11 We just didn't have a transcript for that.

12 But as I hear the state's recitation of
13 the admissible -- you know -- the reason why all of
14 these prior sweat lodges are admissible, I hear the
15 word "pattern" over and over and over again.

16 And, Your Honor, with all due respect,
17 pattern is propensity. Pattern is saying that a
18 man acted in one way in one year and is acting in
19 conformity therewith in subsequent years. That is
20 actually directly prescribed by 404 -- Rule 404.

21 One issue I do -- I do want to note is
22 that Mr. Hughes says that 404 only has to do with
23 character. Actually, it's 404(a) that is the
24 character evidence issue. 404(b) is actually the
25 part that we're talking about here, which is that

1 you cannot use prior acts to show actions in
2 conformity therewith except for under very narrow
3 circumstances. And those narrow circumstances are
4 set out in Rule 404(b). And that was the subject
5 of the Court's ruling in -- on February 3rd, 2011.

6 What I think is critical in why this
7 instruction is so important is the Court is -- and
8 the state has suggested that there's something
9 different and that there's a way that you can
10 introduce this evidence to demonstrate causation
11 that's somehow different than pattern evidence.

12 THE COURT: Mr. LI, if you're talking about a
13 404(b) exception, that is always the case. That
14 evidence has a real danger to it. And you have to
15 have an instruction. You have to limit that other
16 evidence to the extent you can.

17 MR. LI: I agree.

18 THE COURT: So I think -- is that what you're
19 talking about?

20 MR. LI: Yeah. Your Honor, I'm not going to
21 argue the motion for reconsideration.

22 THE COURT: Good.

23 MR. LI: That's in our papers. And we don't
24 have time to do that. We've issued our papers.

25 The only reason why I bring it up is

1 because we -- the Court itself has identified and
2 agreed that we are treading on dangerous grounds
3 and that -- you know -- the Court said there's no
4 doubt about that.

5 This could take us right into the 404(b)
6 area the way the state's articulating it's theory.
7 You know, Mr. Ray did it in one way in 2007;
8 therefore, he must have done it the same way
9 in 2009. We are -- we are sliding directly into
10 that area.

11 And the reason why it's important that we
12 have a very firm limiting instruction is to avoid
13 exactly the dangers that the Court agrees with, the
14 dangerous ground that we are treading on.

15 And so, for instance, our instruction
16 goes directly to what is not permissible under
17 404(b), which is, in fact, the Court's ruling. It
18 is not permissible to use any of the prior acts to
19 draw any inference regarding Mr. Ray's knowledge of
20 any risk of death in 2009. That is exactly the
21 Court's ruling. That is directly in line with
22 404(b).

23 They may not consider evidence regarding
24 sweat lodge ceremonies to demonstrate Mr. Ray's
25 intent, character, or conduct in 2009. Again,

1 directly pulled from the Court's ruling and the
2 rule itself, Rule 404(b).

3 It also prohibits -- under Rule 404(b)
4 and the Court's ruling, it also prohibits the jury
5 from drawing an inference that any person who acted
6 in a certain manner on one occasion is likely to do
7 so again. That's drawn directly from Rule 404(b).

8 And the only purpose that the state now
9 purports is actually a valid reason to causation.
10 And that is you may only consider evidence from
11 those prior sweat lodges, if believed, as it may
12 relate to whether the state has proven beyond a
13 reasonable doubt that the decedents died of heat
14 stroke and not a different cause.

15 That is exactly the theory that the state
16 is now proffering these prior sweat lodge events
17 under. They are saying, look. The tarps were the
18 same. We don't agree with that. But the tarps
19 were the same. The wood was, basically, the same.
20 Everything was the same. Therefore, you can
21 reasonably conclude that these deaths were caused
22 by heat stroke and not by some other cause. And
23 that's exactly what this limiting instruction says.

24 It also establishes that it's not -- the
25 state has to prove this. You know. We have this

1 conversation -- I mean, we had a sidebar at one
2 point where I made an objection about the
3 burden-shifting issue where, I believe, Mr. Hughes
4 asked the doctor whether Ms. Do had shown him any
5 evidence. That's actually -- it's actually the
6 state's burden. And I think that the jury needs to
7 be reminded that the state must prove everything
8 beyond a reasonable doubt.

9 And so this instruction hues very closely
10 to not only Rule 404(b) but the Court's ruling
11 of February 3rd, 2011. And it's critical that be
12 given because what's happening is the evidence is
13 getting --

14 THE REPORTER: The evidence is getting?

15 MR. LI: Well, it's a good chance to use a
16 different word.

17 The evidence is getting conflated and
18 combined into an unidentifiable mess. And it's up
19 to the Court to -- well, and what I mean by that,
20 Your Honor, is that --

21 THE COURT: Again, I'm thinking about
22 everything that came in the opening and all the
23 other evidence. And I'm just puzzled by that.

24 Go ahead.

25 MR. LI: Your Honor, I apologize by the

1 characterization of it.

2 THE COURT: Well, I see a lot of
3 characterization in things that get filed. And,
4 believe me. I'm going to only look at the
5 substance. And --

6 MR. LI: I appreciate that.

7 THE COURT: -- you can characterize it how you
8 wish.

9 MR. LI: I appreciate that, Your Honor. And I
10 will attempt to characterize it in a way that
11 doesn't raise the Court's ire.

12 The point I'm trying to make here is that
13 the evidence has come in in a way that is not clear
14 for what purpose it can and should be used. And
15 there are -- there are -- and the way the state has
16 articulated its theory as pattern is actually
17 impermissible.

18 And so what must happen is that there
19 needs to be an instruction in which the evidence --
20 in which the jury is told what it can do and what
21 it cannot do. And if it doesn't do that, if we
22 don't have that instruction, then we'll -- we'll
23 have the state arguing that there's a pattern.
24 Therefore, it must have been -- Mr. Ray must have
25 been guilty. That is exactly what 404(b)

30

1 prohibits.

2 THE COURT: And what I'm going to do -- we
3 need to start with the jury -- is I'm going to
4 request that both of you look at the 404(b) ruling
5 and look at the discussion that relates -- the
6 medical effects, if you call them that, or physical
7 effects, with the manner in which sweat lodges were
8 conducted. There was a Terrazas finding with
9 regard to that as well. I'll just -- I'll just
10 note that.

11 But the way I see this, Mr. Hughes, is
12 this instruction would, essentially, permit the
13 state to argue things that cannot be argued on the
14 basis of this evidence of causation. And whether
15 it comes in as an exception under 404(b) with
16 witnesses who so far have actually been Terrazas
17 qualified and there's actually -- and there's been
18 sufficient notice and there's been no -- nothing
19 until -- from March 1st until very recently until
20 there's any problem; or whether it's somehow some
21 other basis, this would not, would not, confine the
22 use of that evidence.

23 With regard to the defense instruction,
24 it's accurate with regard to the rulings.
25 It's accurate. The concern I have, Mr. Hughes,

1 is what you've raised, is at what point, though,
2 does it really cross over and do more the other
3 way?

4 So an instruction needs to go today. I
5 agree it's gone on. But I don't want to put it out
6 a bad instruction. That may be a process. It may
7 be an initial instruction and then refining it.

8 The Hartford case that was cited where
9 there was a Rule 20 -- no. I'm sorry. That wasn't
10 the case. But there was actually a Rule 20 granted
11 on a serious charge, and the jury was instructed to
12 disregard all the evidence on that charge.

13 It's important to have an appropriate
14 instruction. And I'll just say that I do think it
15 needs to have detail along the lines of what the
16 defense has proposed. I have a concern, though,
17 Mr. Hughes. I'll note that.

18 So the other -- I did want to mention
19 something. I believe I need to bring this up. In
20 cross-examining Mr. Mercer, there was a question
21 about whether or not Mr. Mercer had concerns about
22 the way Mr. Ray was conducting ceremonies. Both
23 sides recall that question.

24 Mr. LI, you objected, and I sustained it.
25 And then there was some follow up, though, that

32

1 asked about his level of encouraging -- and I don't
2 believe there was an objection to that -- comparing
3 if he encouraged people more. And there was
4 another question about other facilitators and
5 leaving the door open and checking on other
6 participants. And I don't think there was an
7 objection there. And that kind of questioning gets
8 a lot into somehow suggesting bad conduct.

9 So I'd like -- I want to get the jury
10 called and -- really we need to do that. But is
11 there any other anticipated evidentiary issue
12 that's specific? I don't want to start and have a
13 bench conference three minutes into the testimony.

14 MR. HUGHES: I'm not aware of anything, Your
15 Honor.

16 THE COURT: Mr. Kelly?

17 MR. KELLY: I don't mean to be -- with all
18 candor, Judge, I have a great deal of concern as it
19 relates to forms of the question.

20 THE COURT: And I'm going to address that,
21 Mr. Kelly. Thank you. Please sit down.

22 I just -- I've pointed out there are
23 times when leading is sometimes necessary,
24 especially when there's been some -- some pretrial
25 or out-of-the-presence-of-the-jury motion practice.

1 I'm again asking that people be conscious of 602
2 and the basis for the question and that there not
3 be improper leading. Everyone knows the rules.
4 Both sides know those rules apply. I'll just
5 restate them for everybody's benefits.

6 Ms. Polk.

7 MS. POLK: Your Honor, I'm aware of that. The
8 issue arises when the defense in cross-examination,
9 as the Court has noted, suggests to the jury that
10 the evidence is something other than it is. And in
11 examining Mr. Mercer over the last couple of days,
12 I was very, very careful to limit his testimony in
13 accordance with the Court's ruling.

14 The defense then came in with photographs
15 that I had not introduced, trying to suggest
16 something other than what had actually occurred.
17 And specifically I want to note that Mr. Li asked
18 Mr. Mercer a question and Mr. Mercer responded, no.
19 I was not surprised with what happened in 2009.

20 That was opening the door. I was very
21 careful -- I chose not to go back and say to
22 Mr. Mercer, why were you not surprised? And so
23 there are many opportunities where the defense
24 opens doors or deliberately makes the evidence --
25 suggests that the evidence stands for something

1 that it does not. And it dangles out there. And I
2 know the Court is aware of a couple of other
3 occasions where that has happened and the Court has
4 not allowed the state to go back there.

5 Yesterday I chose not to go back there,
6 even though, in my opinion, they are
7 mischaracterizing the evidence deliberately. And
8 then we either don't get to go back there or I need
9 to choose not to go back there.

10 But I'm very aware of the Court's order.
11 Again, with Mr. Mercer I was very careful to limit
12 what came in. And it was really through the
13 cross-examination that a lot more information came
14 in.

15 THE COURT: Well, Ms. Polk, if there's
16 something objectionable, you have to object. I
17 don't think you can not object and then just go
18 into an area and say it's been opened when it's
19 objectionable. I think that's an issue.

20 So if you need to object, object.

21 MS. POLK: And, Your Honor, I'm not saying --
22 if the defense chooses to further explore what
23 happened in 2007 and 2008, the state is not going
24 to object. However, they then have opened that
25 area for the state to go -- and the perfect example

1 is those photographs that I did not introduce, they
2 introduced. And so then I was appropriate in going
3 back over those photographs.

4 THE COURT: And I thought that recross in a
5 specific -- particular point happened to be
6 important. It was, I think, a very important area.

7 But I wasn't thinking of that particular
8 area in terms of the objection. But if you -- if
9 you think that there's something you should have
10 objected to, then I think that needs to be done.
11 And I don't need to comment beyond that.

12 Mr. Kelly, very briefly.

13 MR. KELLY: Ms. Polk's comment exemplifies the
14 problem, Judge. The evidence is not what the State
15 of Arizona believes it is, and it is not what we
16 think it is.

17 The facts are what are elicited from the
18 witnesses on the stand. And yet repeatedly we're
19 accused of some type of misconduct when all we've
20 done is point out to this jury that there's been an
21 inadequate investigation and their doctors cannot
22 testify to a reasonable degree of medical certainty
23 as to the cause of death --

24 THE COURT: Mr. Kelly, if you don't mind --

25 MR. KELLY: -- acknowledge. So --

1 THE COURT: Excuse me. We're not going to
2 have argument right now on various things. Both
3 sides -- and I've really had enough of the
4 argument, any finger-pointing.

5 MR. KELLY: I agree.

6 THE COURT: I'm going to listen to questions.
7 I'm going to make the best rulings I can. But
8 we're not going to sit here and just argue. We're
9 going to be moving ahead with the case.

10 I do want to comment to the state.

11 Mr. Hughes, you said something about
12 months. As I look at this, it would seem to me at
13 the outside the case should be presented in the
14 next three weeks, maybe two weeks. Three weeks at
15 the outside for the state's case. That's my
16 general view of this. I'm just saying that's my
17 observation.

18 But to say that there are months to go or
19 something, I have a concern about that. And I
20 certainly am going to be reasonable. And people
21 have to be able to present the cases. I understand
22 that. But I got concerned when I -- when I heard
23 the term "months."

24 But one thing is we're going to get this
25 on a basis that we're not going to have extensive

1 arguments. I've allowed quite a bit of that.
2 Because without in any way taking away from the
3 very serious and tragic nature of what's going on,
4 it's a novel situation in saying that. And there
5 are arguments that are being made that -- that
6 haven't been made probably.

7 And I've allowed people to argue those
8 things. But we're going to keep away from any kind
9 of personal attacks. That's not going to happen.
10 We're just not going to do that. We're going to
11 focus on legal issues from here on out.

12 Thank you. We'll start in ten minutes.

13 (Recess.)

14 (Proceedings continued in the presence of
15 jury.)

16 THE COURT: The record will show the presence
17 of the defendant, Mr. Ray, the attorneys, the jury.

18 And Ms. Polk, you may call your next
19 witness.

20 MS. POLK: The state calls Debbie Mercer,
21 please.

22 THE COURT: Ma'am, stand right there and be
23 sworn by the clerk.

24 DEBRA J. MERCER,
25 having been first duly sworn upon her oath to tell

1 the truth, the whole truth, and nothing but the
2 truth, testified as follows:

3 THE COURT: Please be seated here at the
4 witness stand.

5 And if you would please start out by
6 stating and spelling your full name.

7 THE WITNESS: Debra, D-e-b-r-a; Jean, J-e-a-n;
8 Mercer, M-e-r-c-e-r.

9 THE COURT: Thank you.

10 Ms. Polk.

11 MS. POLK: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MS. POLK:

14 Q. Good morning, Ms. Mercer.

15 A. Good morning.

16 Q. Will you tell the jury, first of all,
17 where you were born and raised.

18 A. I was born in Chicago. In Elmhurst,
19 Illinois, in the Chicago suburbs.

20 Q. And who are you married to?

21 A. Theodore Martin Mercer.

22 Q. Ted Mercer?

23 A. Yeah.

24 Q. You and Ted have how many kids?

25 A. Two children.

1 Q. And who are they?

2 A. Kyle and Sarah.

3 Q. Which one is older?

4 A. Kyle.

5 Q. Sarah is how old?

6 A. 19.

7 Q. In 2009 -- in October of 2009, how old
8 was Sarah?

9 A. 18.

10 Q. Where does Sarah live now?

11 A. She lives with us.

12 Q. And where do you live?

13 A. In Morristown.

14 Q. Will you tell the jury what you do for a
15 living.

16 A. I work for Health Insurance Solutions,
17 administrative.

18 Q. How long have you done that?

19 A. Since 2000.

20 Q. Where is that company located?

21 A. Our main office is in Sun City, Arizona.
22 We had a branch in Cottonwood here for a year.

23 Q. What do you do for them?

24 A. I do the administrative stuff, the
25 commissions, all the ins and outs and advertising,

1 and, basically, run the office for the agents who
2 work for us.

3 Q. Are you an owner in that company?

4 A. I was -- I was at one time. I'm
5 currently not.

6 Q. During the time that you had a office in
7 Cottonwood, did you also live up here?

8 A. Yes. In Cornville.

9 Q. What year was that?

10 A. 2009.

11 Q. And in 2000 --

12 A. And '10.

13 Q. Prior to 2000 -- when was it that you
14 actually began living up in the Verde Valley?

15 A. Well, it kind of had a stuttered start in
16 that we were coming up quite often and then -- it's
17 kind of hard to answer that question as far as
18 moved every -- everything.

19 Q. When the time came that you started
20 coming up to the Verde Valley, where were you
21 living?

22 A. Angel Valley.

23 Q. And prior to that where were you living?

24 A. Morristown.

25 Q. Which is outside of Sun City?

1 **A. It's in between Sun City and Wickenburg**
2 **on Grand Avenue.**

3 **Q. How did you hear about Angel Valley?**

4 **A. I think I picked up a brochure at one**
5 **point, and then I checked it out on the Internet.**
6 **And then at one point Ted and I became interested**
7 **in real estate and we thought we wanted to live in**
8 **Sedona until we found Cottonwood.**

9 **But we were coming up looking at real**
10 **estate. And that one time we stopped and looked at**
11 **Angel Valley and then started going -- actually not**
12 **on the property. We would go on the other side of**
13 **the creek where the campsites were and the parking**
14 **area. It wasn't until probably 2006 that we**
15 **actually went on the property and talked to the**
16 **people there.**

17 **Q. To get to the area on the other side of**
18 **the creek to the campsites, is it the same road as**
19 **to get to Angel Valley?**

20 **A. Yes. When you go down the road, you get**
21 **down to the curve, and then here's a gate for Angel**
22 **Valley. And if you went straight, it takes you to**
23 **forest service land where there's individual**
24 **campsites, but it's right up the creek from there.**
25 **And you can go the other way too.**

1 **Q. Okay. And we heard that you and your**
2 **husband started volunteering at Angel Valley. Do**
3 **you recall how that came about?**

4 **A. Well, we had been going -- visiting**
5 **there. And we noticed that the grounds seemed to**
6 **have -- you know -- when we first started going**
7 **there, the grounds were real nice and it was**
8 **beautiful.**

9 **And over the course of a period of time,**
10 **it seemed like it went down hill. There was a lot**
11 **of weeds and trees, and it looked like things**
12 **needed to be done. So we said, do you guys need**
13 **help cleaning up the place -- you know. And that's**
14 **how it started.**

15 **Q. Why did you want to volunteer to help**
16 **clean up Angel Valley?**

17 **A. It was just a nice place to be.**

18 **Q. Who did you talk to, if you recall, when**
19 **you made that first arrangement to volunteer there?**

20 **A. Initially we talked to a lady named**
21 **Katherine and another girl, Katie.**

22 **Q. What sorts of things, then, did you do**
23 **when were you volunteering at Angel Valley?**

24 **A. We did a lot of weeding. We just weeded**
25 **it and took down trees on the property that -- you**

1 **know -- needed to be taken down, and painted**
2 **benches and whatever they needed to be done.**
3 **Sometimes it was cleaning out a closet or a storage**
4 **area. Things like that.**

5 **Q. Who did you take direction from when you**
6 **did the weeding or the landscaping work?**

7 **A. Initially it was just the girls in the**
8 **office -- Katie or Katherine.**

9 **Q. And then did you meet Michael and Amayra**
10 **Hamilton at some point?**

11 **A. Yes. But we never took direction from**
12 **them really.**

13 **Q. You worked indirect --**

14 **A. Through the office. Yeah.**

15 **Q. During the time that you were**
16 **volunteering and you were doing weeding on the**
17 **property, tell the jury how you did weeding.**

18 **A. We sat on the ground and picked them up**
19 **by hand.**

20 **Q. Did you ever use any chemicals to take**
21 **care of the weeds?**

22 **A. No. We used our hands. And they gave**
23 **us -- I think they call it a "hula hoe." But they**
24 **were kind of useless. It was easier to just do it**
25 **sitting down and picking them.**

1 **Q. Where are the areas that you weeded?**

2 **A. We weeded all around the cabins and the**
3 **canoes -- I mean the -- canoes. Teepees. Anywhere**
4 **that -- anywhere there was an area that they asked**
5 **us to weed.**

6 **Q. Ms. Mercer, I'm going to put up on the**
7 **overhead Exhibit 140 and just ask you first if you**
8 **recognize what that is a little map of?**

9 **A. Yes, I do. It's Angel Valley property.**

10 **Q. And just show the jury the different**
11 **areas that you weeded when you were volunteering.**

12 **A. Well, I don't know if I would remember**
13 **every area. But I know initially we weeded all**
14 **around these cabins, the bath houses, Crystal**
15 **Hall -- you know.**

16 **Are you talking just when we initially**
17 **were volunteering?**

18 **Q. Yes.**

19 **A. Then I would say that those are the**
20 **areas. We did some -- worked by this teepee over**
21 **here and -- oh. No. Not that teepee. Oh, yeah.**
22 **That teepee. And this teepee. That's the one I**
23 **was thinking of.**

24 **Q. And at some point your husband actually**
25 **became employed at Angel Valley?**

1 **A. Yes.**
 2 **Q.** Do you recall when that was?
 3 **A. Officially, I believe March.**
 4 **Q.** Of what year?
 5 **A. 2008.**
 6 **Q.** And up until March between -- in 2000 do
 7 you know -- do recall what month in 2007 you first
 8 started volunteering at Angel Valley?
 9 **A. I think it was in the summer. It was,**
 10 **like, July. Like -- so we'd been going there**
 11 **before that. But I think we started volunteering**
 12 **in July.**
 13 **Q.** Then from July of 2007, when you first
 14 started volunteering, to March of 2008, when your
 15 husband got employment there, give the jury an idea
 16 of how often it was that you were on the property
 17 doing volunteer work.
 18 **A. Before -- we'd come up as often as they'd**
 19 **let us when -- if they had an open cabin. Because**
 20 **at that point we didn't have a place to stay. So**
 21 **it was when they had an open cabin. So every**
 22 **weekend if they had a cabin available.**
 23 **Q.** When your husband took employment in
 24 March of 2008, were you working?
 25 **A. Working at Health Insurance Solutions?**

1 **Q.** Yes. Working outside of the volunteer
 2 work you were doing at Angel Valley?
 3 **A. Yes. I always had a full-time job at**
 4 **Health Insurance Solutions. When he started --**
 5 **when he started at Angel Valley working there, we**
 6 **had a trailer that we got moved up there and**
 7 **rented. And when that -- when we did that, then I**
 8 **would work at my office Monday, Tuesday, and**
 9 **Wednesday. And I'd leave Wednesday evening and**
 10 **drive up to Angel Valley. And then I'd work at**
 11 **Angel Valley Thursday, Friday, Saturday, Sunday and**
 12 **then drive back Monday morning and work at Health**
 13 **Insurance Solutions.**
 14 **Q.** You just said that you would work at
 15 Angel Valley for the latter part of the week. What
 16 were you doing at Angel Valley when you were
 17 working there?
 18 **A. At that point, once Ted was hired there,**
 19 **I did a lot of the housekeeping, management more,**
 20 **making sure there was enough beds ready for the**
 21 **groups that were coming.**
 22 **So, in other words, I would see the**
 23 **calendar of the groups that were coming and how**
 24 **many people were coming, how many boys and girls,**
 25 **and where -- to put them in what cabins and to make**

1 **sure they had -- you know -- all the stuff they**
 2 **needed in the room and just to supply things for**
 3 **the groups that were coming beforehand.**
 4 **And then when they got, we would -- I**
 5 **would set up different events or activities for the**
 6 **groups as they were called for.**
 7 **Q.** Were you on the payroll at Angel Valley?
 8 **A. Never.**
 9 **Q.** Were you getting paid when you did all of
 10 the duties that you just described?
 11 **A. Never.**
 12 **Q.** That was done in connection with your
 13 husband and his employment there?
 14 **A. I was volunteering. They had said they**
 15 **were going to hire me -- you know. It was always,**
 16 **yeah. We're going to make a place -- you know --**
 17 **to pay you. But they never did.**
 18 **Q.** After your husband took employment there,
 19 did you and he continue to do landscaping or
 20 weeding on the property?
 21 **A. Yes.**
 22 **Q.** Did you continue to do landscaping or
 23 weeding on the property through 2009, or through
 24 October, the end of October 2009?
 25 **A. I did. But that wasn't my primary. You**

1 **know, at that point I was more in the people end of**
 2 **it -- you know -- the housekeeping end, the group**
 3 **end. So I didn't have that much to do with the**
 4 **grounds other than setting up tents. Like, when**
 5 **the James Ray International group comes, we have to**
 6 **set up additional tents.**
 7 **So I did that or cleaned the area around**
 8 **the tents and that. But I didn't do much weeding**
 9 **or landscaping after that.**
 10 **Q.** Show the jury on this map where the tents
 11 are that you just described that you would set up
 12 for Mr. Ray's events.
 13 **A. There -- well, the additional tents we've**
 14 **set up are on the ones over here on the other side**
 15 **of the creek. All these. And then there's some**
 16 **over here, some right here as well. And then for**
 17 **him we put them everywhere. They had to have**
 18 **sleeping for, I believe it was, 75, and in tents or**
 19 **cabins.**
 20 **Q.** You talked about cleaning the area around
 21 those tents when you would set them up. What did
 22 you do to clean the area around the tents?
 23 **A. Picked the weeds up and used the shovels**
 24 **and turned over the dirt and stuff.**
 25 **Q.** And then you talked about taking down

1 trees on the property?

2 **A. Uh-huh.**

3 **Q. How did you take down trees?**

4 **A. With saws. Just the little trees. You**
5 **know, the ones that pop up really fast.**

6 **Q. Can you show on the map, show the jury**
7 **all the areas that you tended to in terms of taking**
8 **care of weeds or doing any landscaping between 2007**
9 **and 2009.**

10 **A. Any area that I may have done**
11 **landscaping -- that would be the whole property.**
12 **Not the swimming areas, but -- oh. This is a --**
13 **this over here is a blow-up of this area. Okay. I**
14 **was right. I got confused.**

15 **Q. Did you --**

16 **A. It would be the whole property, I would**
17 **think.**

18 **Q. You performed landscaping services on the**
19 **whole property?**

20 **A. I would imagine. I mean, I can't**
21 **remember doing landscaping at each specific area.**
22 **But I would say yes.**

23 **Q. And at any time between the time you**
24 **first started volunteering at Angel Valley through**
25 **the time that you left toward the end of 2009, did**

1 you ever use any chemicals or any herbicides of any
2 type in doing the landscaping or weed eating?

3 **A. No. No. We did not.**

4 **Q. Can I ask you, Ms. Mercer -- you just**
5 **indicated some tents that got set up over on this**
6 **side?**

7 **A. Yes.**

8 **Q. How do participants get from the Angel**
9 **Valley -- how do you get across the creek to get to**
10 **those tents?**

11 **A. There's a bridge.**

12 **Q. Did you ever use any poisons at Angel**
13 **Valley?**

14 **A. No. Like -- no. There was a rat in the**
15 **kitchen once, and we had to get a live trap. No.**
16 **We were not allowed to use poisons or pesticides or**
17 **chemicals. It was a very natural place.**

18 **I had to do the shopping for the laundry,**
19 **and we had to get all pure, natural stuff to do the**
20 **laundry.**

21 **Q. Do you -- you just mentioned a rat in the**
22 **kitchen one time. Do you recall when that was?**

23 **A. No. It was cold. I don't remember.**

24 **Q. And how did you get involved in taking**
25 **care of a rat that was in the kitchen?**

1 **A. I tried not to get involved. I didn't --**

2 **I just knew there was one there. And I think Ted**
3 **wanted to use -- you know -- one of those strip**
4 **things. I don't know what they are. But he wanted**
5 **to use something, and Amayra said, absolutely not.**
6 **And then management said we could only use live**
7 **traps. Then what do you do with it? And that**
8 **was --**

9 **Q. Do you recall if it was caught?**

10 **A. No. I think the cat -- I think the cat**
11 **took care of it actually. Because there was two**
12 **cats on the property. And that was my suggestion**
13 **is to get the cats in there. I think that we let**
14 **the cats in the area. And -- I don't remember what**
15 **happened actually.**

16 **Q. Okay. Prior to your becoming -- prior to**
17 **your having a relationship or visiting the Angel**
18 **Valley property, had you ever been in a sweat lodge**
19 **before?**

20 **A. No. I've never been in a sweat lodge.**

21 **Q. Have you ever been in a sweat lodge?**

22 **A. I've never been in a sweat lodge.**

23 **Q. Prior to 2007 did you know what a sweat**
24 **lodge was?**

25 **A. No.**

1 **Q. And in 2007 did you have -- did you come**
2 **to learn about sweat lodges?**

3 **A. Yes.**

4 **Q. And how?**

5 **A. The first one would be the James Ray**
6 **International event in 2007.**

7 **Q. How was it that you came to be involved**
8 **in that event, Mr. Ray's sweat lodge in 2007?**

9 **A. They asked us to help out with the event.**

10 **Q. Who's "they"?**

11 **A. Angel Valley management. I mean, in**
12 **2007 -- yeah. They just asked us. We weren't**
13 **there, and they asked us to come up. We stayed**
14 **in the trailer.**

15 **Q. And at that time were you working for**
16 **Angel Valley?**

17 **A. No. I mean, not officially -- I mean,**
18 **they counted on us. If they needed something, they**
19 **knew they could call on us, and we'd come up and do**
20 **it. But we weren't officially -- we were still**
21 **volunteers.**

22 **Q. Between 2007 and 2009, then, did you**
23 **assist in some sweat lodge ceremonies at Angel**
24 **Valley?**

25 **A. Several.**

1 Q. How many?
 2 A. **I'm guessing 8 or 10.**
 3 Q. And are some of those 8 or 10? Were they
 4 ceremonies performed by Mr. Ray?
 5 A. **Three.**
 6 Q. Do you remember how many you assisted
 7 with or had something to do with in 2007?
 8 A. **James was at the end of the year,**
 9 **September. We may have done one or two after that**
 10 **in 2007. I can't recall specifically.**
 11 Q. And you just said "James." Did you mean
 12 Mr. Ray?
 13 A. **I'm sorry. James Ray.**
 14 Q. It's okay. I just wanted to ask you,
 15 when did you meet Mr. Ray?
 16 A. **I've never been introduced to him. I've**
 17 **seen him on the property and was told beforehand**
 18 **you weren't supposed to go up and talk to him.**
 19 Q. And --
 20 A. **He's spoken to me on the property.**
 21 Q. When you assisted with that first sweat
 22 lodge ceremony, the one put on by Mr. Ray, did you
 23 know what to expect?
 24 A. **No.**
 25 Q. For Mr. Ray's first ceremony, for the

1 first one you assisted with in September of 2007,
 2 did you have a role?
 3 A. **I was, basically, assisting. I was**
 4 **brushing the rocks most of the time and helping the**
 5 **fire keeper.**
 6 Q. Did somebody train you?
 7 A. **No.**
 8 Q. Who was in charge of that ceremony? Do
 9 you recall?
 10 A. **What do you mean "in charge"?**
 11 Q. Well, who was telling you what to do,
 12 since this was your first?
 13 A. **Oh. Gary. Gary Palish.**
 14 Q. And do you know what Gary Palish's role
 15 at Angel Valley was?
 16 A. **I believe he was the general manager.**
 17 Q. You just said to the jury you assisted
 18 with some rocks. Explain to the jury, first of
 19 all, what you understood your role for that
 20 September 2007 sweat lodge to be.
 21 A. **As the fire tender would take the rocks**
 22 **out of the fire, he would bring them over to an**
 23 **area where we would brush them off with a whisk**
 24 **broom. And then it would be handed off to a person**
 25 **who took it into the sweat lodge and then handed**

1 **off to the other person who would put them in the**
 2 **middle of the lodge.**
 3 Q. And your role was what?
 4 A. **To brush off the rocks and hand them to**
 5 **the person in the sweat lodge.**
 6 Q. The pitchfork came to you from somebody?
 7 A. **Well, yeah. Pitchfork or a shovel.**
 8 Uh-huh.
 9 Q. And --
 10 A. **It would usually transfer -- the fire**
 11 **keeper would take it out with his pitchfork or**
 12 **shovel and it would come onto the rock. And then**
 13 **the next person would come over with a fork or a**
 14 **shovel and pick it up after it was brushed off and**
 15 **then hand it off into the sweat lodge.**
 16 Q. Were you doing any of the hand-offs into
 17 the sweat lodge?
 18 A. **Yes.**
 19 Q. You were also brushing them off?
 20 A. **Yes.**
 21 Q. How was it that you would do both?
 22 A. **Because you switch off. Because one**
 23 **person -- depending on how many rocks you take --**
 24 **you know -- you -- there would be a motion. So one**
 25 **person would be putting a rock in while the fire**

1 **tender is getting another rock out and brushing it**
 2 **off. So it would rotate.**
 3 Q. About how long does it take to get ten
 4 rocks into a sweat lodge using that system that you
 5 just described for the jury?
 6 A. **It depends. Because each time you have**
 7 **to uncover rocks. And it's hot. So it -- you**
 8 **know -- it depends on how long it takes the fire**
 9 **tender to get the rocks out of the fire.**
 10 **Approximately five or six minutes, maybe**
 11 **eight.**
 12 Q. To get about ten rocks in a sweat lodge?
 13 A. **Yeah.**
 14 Q. And in 2007, then, did you have any other
 15 role other than brushing off rocks and then getting
 16 them to the door of the sweat lodge?
 17 A. **I'm not -- during the sweat lodge -- I**
 18 **mean, then people would come out and we would**
 19 **get -- I would get them water or try and cool them**
 20 **off or clean their faces off.**
 21 Q. And let me ask you this: Before that
 22 ceremony started had somebody instructed you to
 23 take care of participants as they came out?
 24 A. **No. And we were kind of shocked by that**
 25 **and --**

1 MR. KELLY: Your Honor, objection.
 2 THE COURT: That's sustained.
 3 Q. BY MS. POLK: Let me ask you some
 4 specific questions, then.
 5 MR. KELLY: Your Honor, object to this line of
 6 questioning based on relevance.
 7 THE COURT: Overruled.
 8 Q. BY MS. POLK: Ms. Mercer, limiting your
 9 testimony to what you personally saw or heard, so I
 10 don't want you to guess as to why something was
 11 happening but just what you observed about a person
 12 or what you heard and what you personally saw or
 13 heard, was your attention drawn -- once the
 14 ceremony began in 2007, was your attention drawn to
 15 a specific person?
 16 A. Yes.
 17 Q. That's a yes or no question.
 18 A. Yes.
 19 Q. And what about that person drew your
 20 attention?
 21 Actually, let me -- let me ask you a
 22 question before that. At what round of the
 23 ceremony was your attention first drawn to a
 24 specific person?
 25 A. **This time I don't know if I can recall**

1 **what round it was.**
 2 Q. Let's talk generally, then, about near
 3 the -- during the first few rounds of Mr. Ray's
 4 ceremony, was your attention drawn to a specific
 5 person?
 6 A. **Yes. At the beginning.**
 7 Q. And what about that person drew your
 8 attention?
 9 A. **A woman was exiting the sweat lodge, and**
 10 **she appeared to be having difficulty getting out.**
 11 **And as she got to the door, she tried to stand up,**
 12 **and she went flat on her face in the sand moving**
 13 **forward.**
 14 Q. Did you go to her?
 15 A. Yes.
 16 Q. And what did you do once you went to her?
 17 A. **I turned her over. And her -- do I go**
 18 **on?**
 19 Q. Yes.
 20 A. **I turned her over, and her eyes were**
 21 **fluttering back in the head -- she had the most**
 22 **beautiful blue eyes. And they were fluttering back**
 23 **in her head. And her tooth was broken or chipped,**
 24 **and she had blood on the side of her face.**
 25 Q. What did you do, then, to the -- to the

1 woman? Did you move her?
 2 A. **Yes. I moved her over to a tarp and --**
 3 Q. And let me ask you that. Are you sure
 4 there was a tarp in 2007?
 5 A. **No, I'm not, actually. We moved her out**
 6 **of the doorway.**
 7 Q. Okay. And you say "we." Did somebody
 8 else help you?
 9 A. **Yes. She was -- I don't remember who**
 10 **helped me. But she was bigger than me, and I**
 11 **couldn't pull her by myself.**
 12 Q. After you moved her out of the doorway,
 13 did you stay with her?
 14 A. **I stayed with her briefly. Amayra came**
 15 **down at one point, and then she sort of took over**
 16 **to -- taking care -- she went up and got her some**
 17 **stuff for her face and ice and so forth.**
 18 Q. Did you then go back to taking care of
 19 the rocks?
 20 A. Yes.
 21 Q. And was your attention drawn to a second
 22 person?
 23 A. **In 2007? There's a lot of people.**
 24 Q. And this is just a yes or no question.
 25 Can you think of another person that you -- that

1 your attention was drawn to?
 2 A. **A guy came out. Yes.**
 3 Q. Okay. And do you recall when in the
 4 ceremony this second person that you're thinking
 5 of -- when your attention was drawn to him?
 6 A. **I believe it was at the end of the lodge.**
 7 Q. Was it before it was over or after the
 8 ceremony was over?
 9 A. **I can't recall. I think it was after. I**
 10 **can't recall.**
 11 Q. Okay. And is this a man or woman?
 12 A. **A man.**
 13 Q. And tell the jury -- limiting it to what
 14 you personally saw or heard, tell the jury what you
 15 saw or heard.
 16 A. **He wanted me -- he asked me to get him to**
 17 **the water. He said he had a heart condition and**
 18 **his heart was scaring him and he wanted to get to**
 19 **the water and cool off.**
 20 Q. What was his demeanor?
 21 A. **He was somewhat panicked and wanted me to**
 22 **get him there very quickly. He had no shoes on,**
 23 **and he was just walking through sticks and things**
 24 **that should have hurt his feet. But -- I mean, I**
 25 **would think they would hurt his feet. But he was**

1 just walking and really, really, really, really
 2 wanted to get to that water quickly.
 3 Q. And what did you do?
 4 A. I got him to the water.
 5 Q. How did you get him to the water?
 6 A. We just plowed our way through the --
 7 through the area. I mean, there's not really a
 8 path. So, like I said, we were -- because the --
 9 the creek is there. But when it floods -- you
 10 know -- it'll be wider. It'll leave debris and
 11 such. So we were walking through old debris to get
 12 to where the water was running in the creek.
 13 Q. If you look up at the map again that's
 14 still on the overhead, I'll direct your attention
 15 to this area. Do you recall that that's where the
 16 sweat lodge was in 2007?
 17 A. Yes.
 18 Q. And just show the jury, then -- just
 19 illustrate on this overhead how you got the man to
 20 the creek.
 21 A. I believe we came out and went kind of
 22 like that. Closer to the door, but yeah.
 23 Q. What did the man -- did you observe what
 24 the man did when you got to the creek?
 25 A. Well, he kind of just stopped. Because

1 we were walking, walking, and, like I said, the
 2 debris from where a flood would be. And then --
 3 you know -- he kind of just fell right in and he
 4 was in the water. And then his friend came up
 5 right behind, and so then I went back.
 6 Q. Did you ever observe that man again in
 7 2007?
 8 A. I don't remember.
 9 Q. Do you recall if you later talked to that
 10 man?
 11 MR. KELLY: Your Honor, objection. Lack of
 12 foundation.
 13 THE COURT: Overruled.
 14 If you can answer that, ma'am, you may.
 15 It called for a yes or no. If you can answer in
 16 that fashion. If you can't, you need to let the
 17 lawyer know that.
 18 THE WITNESS: I can't recall at this time.
 19 Q. BY MS. POLK: Okay. Did you assist --
 20 this is a yes or no question. Did you assist
 21 anybody -- any other participants from Mr. Ray's
 22 sweat lodge ceremony in 2007?
 23 A. Yes.
 24 Q. And what -- in what way did you assist
 25 other participants?

1 A. Wiping a face off, pulling them out of
 2 the door, trying to get them to wake up, comforting
 3 them, keeping -- putting a blanket or towel on,
 4 giving them water.
 5 Q. Are you able to recall how many people
 6 you assisted in 2007?
 7 A. Anyone that needed it. Maybe 20.
 8 Q. And you say wiping faces off?
 9 A. Yes.
 10 Q. What were you wiping off of the faces?
 11 A. I'm not sure what comes out of -- I mean,
 12 stuff out of their nose. Like when you're throwing
 13 up and you're sick, you get stuff out of your nose,
 14 stuff out of their mouth. A lot of them were
 15 crying. So wiping their faces from that and --
 16 yeah.
 17 Q. Did you see anybody vomiting?
 18 A. Yes.
 19 Q. And then you testified that you assisted
 20 by waking people up. Do you have a specific
 21 recollection of somebody that you had to wake up?
 22 A. I don't remember the person that was --
 23 but I remember someone on the Dream Team and I were
 24 sitting with a person, and they were -- the Dream
 25 Team lady was, like, touching points on their arms

1 and hands. And I was wondering -- you know -- why
 2 they were doing that. And I imagine it was some
 3 reflexology or something.
 4 MR. KELLY: Your Honor, objection to the
 5 speculative.
 6 THE COURT: Sustained.
 7 Q. BY MS. POLK: And I don't want you to
 8 guess about anything. But that person that the
 9 Dream Team member was touching -- what did you
 10 observe about the person's eyes? Were they open?
 11 A. No.
 12 Q. And what else did you observe about that
 13 person?
 14 A. They were -- they were nonresponsive.
 15 Q. How long were you with that person?
 16 A. Until they woke up.
 17 Q. And how long did that take?
 18 A. I can't recall exactly. I wondered if
 19 they were going to wake up. It was longer than
 20 five minutes.
 21 Q. Did you assist in cooling people off with
 22 water?
 23 A. In 2007, yes.
 24 Q. How did you do that?
 25 A. A hose.

1 Q. Do you recall, Ms. Mercer -- this is a
 2 yes or no question. Do you recall -- by the end of
 3 Mr. Ray's ceremony in 2007 for the final round, do
 4 you recall how many people were outside?
 5 A. Almost half.
 6 Q. And for that final round, do you recall
 7 if people went back in?
 8 A. In 2007 I remember a lot of people would
 9 go in and out, in and out. Like, one girl I
 10 remember came out almost every round, and she'd get
 11 some water. She was crawling like a dog. And
 12 she'd come out and -- you know -- put water in her
 13 mouth and she'd gobble it up and go back in. So
 14 there was a lot of going in and -- in and out in
 15 2007.
 16 Q. Did you talk to Gary Palish in 2007 about
 17 what you were seeing?
 18 A. Yes.
 19 Q. And do you recall what you said to Gary?
 20 A. I just remember being alarmed at the
 21 condition the people were in. And I can't remember
 22 exactly what he said.
 23 Q. Did Mr. Palish address that concern you
 24 had?
 25 A. He -- something like they may feel --

1 MR. KELLY: Your Honor, objection. Hearsay.
 2 THE COURT: Sustained.
 3 Q. BY MS. POLK: I just want you to answer
 4 that yes or no.
 5 A. No.
 6 Q. Did Mr. Palish address your concern?
 7 A. Yes.
 8 Q. Okay. Did you do other ceremonies, if
 9 you recall, in 2007 that were not facilitated by
 10 Mr. Ray?
 11 A. I don't recall specifically, but I
 12 believe I did.
 13 Q. Do you recall --
 14 A. I know that -- I know that in 2007 I
 15 thought why would anyone do a sweat lodge.
 16 MR. KELLY: Your Honor, objection.
 17 THE COURT: Sustained.
 18 And that response is stricken.
 19 Q. BY MS. POLK: And I -- just have you
 20 listen to my question. Did you do any sweat lodge
 21 ceremonies after Mr. Ray's ceremony in 2007 by
 22 people other than Mr. Ray?
 23 A. Yes.
 24 Q. And do you recall how many ceremony --
 25 did you do addition -- did you do another ceremony

1 for -- with Mr. Ray -- for Mr. Ray?
 2 A. In 2007?
 3 Q. In -- later. 2008.
 4 A. Yes.
 5 Q. Had you done ceremonies in that interim
 6 for facilitators other than Mr. Ray?
 7 A. Yes, I did.
 8 Q. And for those ceremonies --
 9 MR. KELLY: Your Honor, objection. Relevance,
 10 other ceremonies.
 11 THE COURT: Overruled.
 12 Q. BY MS. POLK: Do you recall the names of
 13 facilitators --
 14 MR. KELLY: Your Honor, objection. 403,
 15 cumulative.
 16 THE COURT: Sustained.
 17 Q. BY MS. POLK: For the ceremonies
 18 performed by individuals other than Mr. Ray, were
 19 you present?
 20 MR. KELLY: Your Honor, objection.
 21 THE COURT: You may answer that one.
 22 Overruled.
 23 You may answer that question.
 24 THE WITNESS: Yes. I was present for other
 25 sweat lodges than James Ray International.

1 Q. BY MS. POLK: And I'm asking you
 2 specifically between the first sweat lodge ceremony
 3 for Mr. Ray that you did and then the second one
 4 for Mr. Ray, did you do other ceremonies not
 5 facilitated by Mr. Ray?
 6 A. Yes, I did.
 7 Q. And do you recall approximately how many?
 8 A. Approximately three.
 9 Q. For those ceremonies not facilitated by
 10 Mr. Ray, what were your -- what was your role?
 11 MR. KELLY: Your Honor, objection. Relevance.
 12 THE COURT: Overruled.
 13 THE WITNESS: After James Ray International, I
 14 believe I did one more that I was assistant. And
 15 then the next one I was the door keeper.
 16 Q. BY MS. POLK: And tell the jury what the
 17 door keeper is.
 18 A. As far as my understanding of what Angel
 19 Valley told me, the door keeper stays positioned at
 20 the door throughout the entire lodge to -- several
 21 purposes. To hold the energy and to be there for
 22 when the pourer asks for the door to be opened or
 23 asks for rocks or asks for anything.
 24 I'm there to halfway listen to what's
 25 going on there, so I have to be aware of what's

1 **going on in the lodge enough to hear James Ray call**
2 **for the door to be opened.**

3 **Q.** For those ceremonies that you were at
4 facilitated by individuals other than Mr. Ray
5 between Mr. Ray's 2007 ceremony and 2008 -- so I'm
6 asking about ceremonies facilitated by other
7 individuals -- did you observe anybody vomit?

8 **MR. KELLY:** Your Honor, objection. It's
9 cumulative. Form of the question.

10 **THE COURT:** Counsel, please approach.

11 And ladies and gentlemen, again, please
12 feel free to stand up. And also, Ms. Mercer, if
13 you wish to stand up, that's fine too.

14 (Sidebar conference.)

15 **THE COURT:** Just so we don't have this
16 repeatedly, some corroboration, I understand, can
17 be appropriate. But what I'd be concerned with is
18 foundation. It's very unclear with how much she's
19 really around -- she assisted in one -- did she
20 see? Did she have any basis?

21 What I'm going to, basically, allow is
22 some corroboration but not going through all the
23 process that she did have a basis to observe. She
24 wasn't back and forth or something. Whatever.

25 **MS. POLK:** Okay.

1 **THE COURT:** And then basic corroboration.

2 **Mr. Kelly,** I understand if you feel you
3 need to object. You've certainly -- well, if you
4 need to object, you have to do that. I don't
5 expect lengthy questioning in this area at all.

6 **Mr. Kelly.**

7 **MR. KELLY:** Your Honor, I would renew my
8 objection articulated before this witness's
9 testimony. Secondly, I'd object on basis that it's
10 cumulative to Mr. Mercer's testimony.

11 Finally, Judge, I would object on the
12 form of the question and ask that the prosecutor be
13 directed to simply ask open-ended questions, what
14 did you observe, versus leading the witness through
15 the observations the state wants the jury to hear.

16 **THE COURT:** If that happens, there may well be
17 characterizations outside of what -- instead of
18 going through this basic list of heat-related
19 things, there has been medical testimony. Who
20 knows what she will come up with. That's the issue
21 we're talking about.

22 **Ms. Polk** can establish foundation. She's
23 there long enough to have a meaningful observation
24 period, so she might have missed things that
25 happened with other people.

1 If you get past that -- I would

2 anticipate Ms. Polk would be going through that
3 list, confined list, and that would be it. If it's
4 open, then things may happen, and she's going to be
5 able to answer. I'm just telling you that right
6 now. Trying to keep the evidence somewhat orderly.

7 **MR. KELLY:** Judge, I would note that yesterday
8 there was no cross-examination on other nonJRI
9 events. We continued to object to this line of
10 questioning and ask that a continuing objection be
11 on the record so that I do not have to continue to
12 object in front of this jury.

13 **THE COURT:** I'm not going to allow a
14 continuing objection. I cannot do that. That's
15 not tenable.

16 In terms of the nonJRI events, that's
17 what goes to this physical causation issue. One of
18 the issues has been the different types of
19 causation. Mr. Li has referred to it. But it's
20 actually manifested in the suggested instructions
21 to me. But again, that's overruled.

22 I know you're objecting, basically, on
23 relevance ground. If that's the case, you have to
24 make the objections.

25 **MR. KELLY:** Judge, I would also state for the

1 record that we have no ability midway through trial
2 to present a witness to contest this particular
3 witness's testimony as proffered by the State of
4 Arizona. It affects our right of confrontation.

5 As an example, I would point to the JRI
6 events in 2008 where the photographs clearly show
7 that, although some people appeared to be in some
8 sort of distress, other people are very, very
9 happy. And we have no ability to confront this
10 type of evidence because we didn't know that nonJRI
11 events were going to be admissible in the state's
12 case in chief.

13 **THE COURT:** Ms. Polk, what about that? I
14 can't remember -- well, is that in the transcripts
15 you've provided to me or are providing argument on
16 that particular point?

17 **MR. KELLY:** Judge, I don't want to misstate
18 what's in a transcript or in argument. But we have
19 always believed, given the Court's representations
20 and the disclosure statements provided, that there
21 is not going to be reference to nonJRI events.

22 And I direct your attention to
23 Ms. Foster's testimony in the sidebar where we had
24 this discussion. It was somewhat reaffirmed by
25 Your Honor's statements last Friday. So, again,

1 the problem is one basic confrontation.

2 THE COURT: I want you to --

3 MS. POLK: First of all, they can confront
4 this witness. Secondly, the Court's ruling on the
5 404(b) was not until February 3, 2011. The witness
6 list for both the state and the defense were due
7 before then and submitted before that court ruling.
8 So the suggestion that they cannot bring in other
9 witnesses simply is not supported by the facts in
10 the case.

11 February 3 was the Court's ruling.
12 February 14 the state filed a motion for
13 reconsideration. And on March 1 the Court
14 indicated clearly that the information was relevant
15 to the issue of causation and has continued to
16 emphasize that throughout the -- we're kind of
17 rehashing an issue we've gone over and over.

18 But the suggestion that they prepared
19 their case with one thing in mind isn't born out by
20 the fact that witness lists and exhibit lists were
21 due before the Court's ruling on February 3.

22 But they can confront this witness. And
23 they can bring in other witnesses from each one of
24 these years. All that information was disclosed to
25 the defense in over about 8,000 pages of disclosure

1 now. I'm not quite sure what the issue is.

2 MR. KELLY: I believe the Sixth Amendment is a
3 little more broad than simple cross-examination.
4 It's a right to confront the accuracy or
5 credibility of a witness by innumerable grounds,
6 including extrinsic evidence.

7 We have other participants' names. They
8 were never disclosed in the nonJRI events that this
9 lady attended. We don't know if she was there. We
10 have to take her answer simply based on what it is
11 today in front of the jury. That's the
12 confrontation issue, Judge.

13 We do have a copy of the April 1 --
14 portion of the transcript from April 1. And this
15 issue was addressed with Fawn Foster. It was my
16 understanding during that discussion that we
17 weren't going to go into nonJRI events and make
18 comparisons.

19 THE COURT: There was -- again, we're talking
20 about materials used and issues that go to weight
21 and foundation and all those various things and
22 what was -- about Ms. Foster was going to have her
23 get into. To me the recollection was expert
24 somehow. And that's what I recall about that.

25 Anyway, Ms. Polk and Mr. Kelly, I've

1 indicated how it goes through. Ms. Polk will ask a
2 question. I'm going to allow some leading in this
3 area. If it's sustained, Ms. Polk is going to have
4 to ask what the observations are and the answer is
5 going to be what it is.

6 MS. POLK: Your Honor, I didn't understand why
7 you sustained on who the facilitators were for
8 non -- for other events. I was just trying to lay
9 foundation.

10 THE COURT: Well, go ahead, Mr. Kelly.

11 MR. KELLY: My thought that the title
12 itself is, first of all, cumulative. Submit all of
13 this is cumulative given Mr. Mercer's testimony
14 yesterday. It has minimal probative value.

15 And the names provided by Mr. Mercer,
16 based on my experience in Arizona, are names
17 typically of Native Americans. And it implies
18 improperly that if you're not a Native American,
19 you cannot do this.

20 THE COURT: That's what went through my mind
21 at the time, emphasizing an aspect. These
22 witnesses -- I'm not going to release because I'm
23 looking at the cumulative effect. I've talked
24 about it. If the defense for some reason goes into
25 that, there may be reasons to have rebuttal, so

1 these people are staying on.

2 Yes. We don't need to be mentioning
3 names. We're down to where there can be some
4 corroboration. It doesn't need to be much. If the
5 defense really challenges that sometimes, and there
6 might be some balancing that has to be considered
7 on rebuttal. This should be very, very quickly. I
8 hope we have the ground rules at this point.

9 Thank you.

10 (End of sidebar conference.)

11 THE COURT: Ms. Polk.

12 MS. POLK: Thank you.

13 Q. Thank you, Ms. Mercer. In 2007 for the
14 sweat lodges that you attended not conducted by
15 Mr. Ray, were you at the sweat lodge site for the
16 entire ceremony?

17 A. Most of them I was.

18 Q. And which ones were you not?

19 A. Well, I would just say that during the --
20 I smoke cigarettes. So at one point I might have
21 gone off to the side and smoked a cigarette. But
22 other than that I would have been there.

23 Q. And when you went off to the side to
24 smoke a cigarette, did you leave the area of the
25 sweat lodge?

1 A. Yes.
 2 Q. Could you --
 3 A. **The sacred space. Yes.**
 4 Q. Could you still see the sweat lodge?
 5 A. Yes.
 6 Q. And when you say "the sacred space" that
 7 you left, describe for the jury what you're talking
 8 about.
 9 A. **Around the sweat lodge there's rocks in a**
 10 **circle or -- that -- that create a sacred space**
 11 **around the lodge. And before people enter into the**
 12 **sacred space, they're to be saged and free of**
 13 **negative energy to enter the sacred space.**
 14 Q. When you went outside that sacred space
 15 to smoke your cigarette during a ceremony, were you
 16 always within sight of the sweat lodge?
 17 A. Yes.
 18 Q. And were you within hearing distance?
 19 A. Yes.
 20 Q. With respect to these ceremonies that you
 21 attended or assisted at in 2007 not facilitated by
 22 Mr. Ray, did you ever observe anybody vomit?
 23 A. **During the sweat lodge?**
 24 Q. Yes.
 25 A. No.

1 Q. At any time?
 2 A. **No, I did not.**
 3 Q. Did you ever observe any participant with
 4 eyes fluttering?
 5 A. **No, I did not.**
 6 Q. Did you ever observe any participant
 7 crying?
 8 A. **Yes, I did.**
 9 Q. And how often?
 10 A. **I just remember one particular lady. She**
 11 **was actually -- it was happy crying. She was very**
 12 **joyful, feeling renewed. And it was happy crying.**
 13 **That's the only other lady I remember crying.**
 14 Q. Did you ever observe anybody fall down at
 15 the entrance as they were trying to get out?
 16 A. **No, I did not.**
 17 Q. Did you ever observe anybody run down to
 18 the river to cool off?
 19 A. **No, I did not.**
 20 Q. Did you ever observe anybody who had
 21 fainted?
 22 A. **No, I did not.**
 23 Q. Did you ever assist any of the
 24 participants for those other ceremonies?
 25 A. **Can you rephrase that. I'm not sure what**

1 **you mean.**
 2 Q. Did you ever render assistance to any of
 3 those participants for the ceremonies not
 4 facilitated by Mr. Ray?
 5 A. **Nobody needed assistance after a sweat**
 6 **lodge.**
 7 MR. KELLY: Your Honor, object. I think the
 8 answer be stricken.
 9 THE COURT: Sustained. And the answer is
 10 stricken.
 11 Q. BY MS. POLK: Do you know a woman named
 12 Fawn Foster?
 13 A. **Yes, I do.**
 14 Q. And how do you know Fawn?
 15 A. **Through Angel Valley.**
 16 Q. Is she a friend of yours?
 17 A. **Currently, yes.**
 18 Q. And how close of a friend is she?
 19 A. **How do you describe that?**
 20 Q. Was she a good friend?
 21 A. **Yes.**
 22 Q. In 2008 are you -- do you know whether
 23 Fawn Foster actually went inside and participated
 24 in a sweat lodge?
 25 MR. KELLY: Your Honor, objection.

1 THE COURT: Overruled.
 2 You may answer that if you have personal
 3 knowledge.
 4 THE WITNESS: Yes. I do.
 5 Yes. She did.
 6 Q. BY MS. POLK: And do you recall
 7 approximately when that was? Let me -- let me
 8 rephrase that.
 9 Were you at the ceremony that Fawn Foster
 10 went inside and participated in?
 11 A. **Yes, I was.**
 12 Q. In 2008 did you assist another ceremony
 13 by Mr. Ray?
 14 A. **Yes, I did.**
 15 Q. Do you recall when that was?
 16 A. **I believe it was the middle or later end**
 17 **of September.**
 18 Q. And prior to that ceremony, did you
 19 participate in the building of a -- of a new frame
 20 for a sweat lodge?
 21 A. **Yes, I did.**
 22 Q. Did you take pictures?
 23 A. **Yes, I did.**
 24 Q. I'm going to show you some exhibits. I'm
 25 going to show you Exhibits 242, 243, 244, 245, 246,

1 and 247. Do you recognize all these photographs?
 2 **A. Yes, I do.**
 3 **Q.** Are these the photographs that you took?
 4 **A. Yes.**
 5 **Q.** In 2009 did you provide these photographs
 6 to Detective Diskin?
 7 **A. Yes, I did.**
 8 **Q.** And do you see Detective Diskin here in
 9 the court?
 10 **A. Yes, I do.**
 11 **Q.** Did you know Detective Diskin before
 12 2009?
 13 **A. No.**
 14 **Q.** Where were the photographs when you
 15 retrieved them and gave them to Detective Diskin?
 16 **A. On my computer.**
 17 **Q.** Did you help build this frame?
 18 **A. Yes, I did.**
 19 **Q.** I just want to put up on the overhead
 20 Exhibit 242, for example.
 21 Can you tell the jury what's happening
 22 here.
 23 **A. Well, the sticks are being tied to create**
 24 **the dome structure.**
 25 **Q.** Did you know how to build a frame for a

1 sweat lodge?
 2 **A. No.**
 3 **Q.** And do you recall how many days it took
 4 you?
 5 **A. No. It took us longer than we thought**
 6 **because -- I'd say four days.**
 7 **Q.** And who showed you how to build a sweat
 8 lodge frame?
 9 **A. Well, the gentleman here. And somebody**
 10 **else came. I just -- I just did what Ted told me**
 11 **to do. I don't -- nobody else told me what to do**
 12 **actually.**
 13 **Q.** I'm going to put up on the overhead
 14 Exhibit 245. Is that you?
 15 **A. Me and my dog. Yes, it is.**
 16 **Q.** Do you know who took this picture?
 17 **A. No. Either Anita or Ted.**
 18 **Q.** And then 246. Do you recognize that as
 19 the frame of the sweat lodge you constructed
 20 in 2008?
 21 **A. Yes.**
 22 **Q.** Did you participate in putting the
 23 coverings on the sweat lodge, on the frame?
 24 **A. Yes, I did.**
 25 **Q.** And did you participate in getting the

1 coverings from a location at Angel Valley?
 2 **A. Yes, I did.**
 3 **Q.** Who did you help do that?
 4 **A. What year?**
 5 **Q.** Well, we're talking about 2008 when you
 6 constructed this particular frame and sweat -- and
 7 sweat lodge.
 8 **A. That year it was Ted, Anita, and I.**
 9 **Q.** And did you actually go somewhere and get
 10 the blankets and the sleeping bags and the tarps?
 11 **A. Yes.**
 12 **Q.** Where did you go to get them?
 13 **A. The blankets, sleeping bags, and tarps**
 14 **were stored in the pump house on the property.**
 15 **Q.** Did you personally retrieve the coverings
 16 for the sweat lodge on more than one occasion?
 17 **A. Yes. But I needed help. I didn't do it**
 18 **myself.**
 19 **Q.** Who would you help or who would help you?
 20 **A. Either Ted or Anita.**
 21 **Q.** How many times, Ms. Mercer, between 2007
 22 and 2009 did you go to the pump house and get the
 23 coverings for the sweat lodge?
 24 **A. In a number? As many times as there was**
 25 **a sweat lodge, so I'd say 8 to 10. But we have to**

1 **put them back too.**
 2 **Q.** That was going to be my next question.
 3 When a sweat lodge was finished, did you
 4 participate in dismantling it?
 5 **A. Yes, I did.**
 6 **Q.** And tell the jury what that entailed.
 7 **A. We would -- that night -- or the day of**
 8 **the sweat lodge you left it. The next day we would**
 9 **take the tarps off and the blankets and fold them**
 10 **up.**
 11 **Can I elaborate?**
 12 **Q.** Yes.
 13 **A. For most sweat lodges we'd take the tarps**
 14 **off and the blankets and put them all away in one**
 15 **day. James Ray International sweat lodges, the**
 16 **blankets were very wet afterwards, so we would take**
 17 **the tarps off and leave the blankets on top of the**
 18 **dome for another day to air out and dry before we**
 19 **took them off and folded them up and put them away.**
 20 **Q.** And did you always put all of the
 21 blankets and the tarps back in the same pump house?
 22 **A. Yes. They all were -- were stored in the**
 23 **same place.**
 24 **Q.** Between 2007 and 2009, when you retrieved
 25 the blankets for the sweat lodge, did you ever

1 notice any sort of chemical or a rat poison in
 2 those blankets?
 3 **A. No.**
 4 **Q.** And the same question -- well, let me ask
 5 you. Where were the blankets specifically stored
 6 in the pump house?
 7 **A. The blankets were on a table.**
 8 **Q.** And where were the tarps?
 9 **A. That big brown one was on the left side**
 10 **of the door, and the other ones were usually on the**
 11 **right.**
 12 **Q.** And did you personally participate in
 13 helping to retrieve the tarps that were on the
 14 right?
 15 **A. Yes. Although I tried to avoid that**
 16 **brown one because it's heavy.**
 17 **Q.** At any time between 2007 and 2009, when
 18 you retrieved the tarps, did you ever observe any
 19 sort of product that appeared to be a rat poison
 20 fall out of the tarps?
 21 **A. No, I did not.**
 22 **Q.** And the same question for the brown
 23 thing. At any time between 2007 and 2009, when you
 24 were getting near the brown cover, did you ever
 25 observe any product that appeared to be rat poison

1 fall out of it?
 2 **A. No, I did not.**
 3 **Q.** The sweat lodge that we see in the
 4 picture that's on the overhead now, which is
 5 Exhibit 246 -- is this the sweat lodge that Mr. Ray
 6 performed his ceremony in 2008 in?
 7 **A. Yes.**
 8 **Q.** Did you have a role in that ceremony?
 9 **A. Yes, I did.**
 10 **Q.** Tell the jury what your role was.
 11 **A. In 2008 I was assistant fire -- assistant**
 12 **door keeper.**
 13 **Q.** What did the assistant door keeper do?
 14 **A. The same thing the door keeper did. I**
 15 **was just there with him. I hadn't done a James**
 16 **Ray -- I hadn't been the door keeper for a James**
 17 **Ray International event. And so Gary was there,**
 18 **and I was just assisting.**
 19 **Q.** Was Gary training you?
 20 **A. I wouldn't say he said I'm going to train**
 21 **you for this, but I was definitely -- you know --**
 22 **watching. But I had done three or four by then. I**
 23 **just hadn't done one for Mr. Ray.**
 24 **Q.** You had done three or four as a door
 25 keeper before?

1 **A. Uh-huh.**
 2 **Q.** And I'd like you to talk about Mr. Ray's
 3 ceremony, then, in 2008. And I want you
 4 specifically to limit your testimony to what you
 5 personally saw or heard.
 6 Was your attention drawn to a specific
 7 individual? Yes or no?
 8 **A. Yes.**
 9 **Q.** And do you recall at what point in the
 10 ceremony your attention was drawn to a specific
 11 individual?
 12 **A. It's hard to think.**
 13 **Q.** Let me ask you this, Ms. Mercer: Was
 14 your attention drawn to a specific individual
 15 before the ceremony was over?
 16 **A. Yes.**
 17 **Q.** And what about that individual drew your
 18 attention? Limiting it to what you observed.
 19 **A. There were several.**
 20 **Q.** And we'll talk about several. But I just
 21 want to talk about one at a time.
 22 **A. Okay.**
 23 **Q.** So just think of one person whose
 24 attention -- who attracted your attention.
 25 **A. Okay.**

1 **Q.** And --
 2 **A. Probably about the fifth or sixth round,**
 3 **my attention was drawn to a fellow who had**
 4 **previously come out of the sweat lodge not alert.**
 5 **He was passed out.**
 6 **Q.** And how did you -- when did you first see
 7 somebody that you're now say -- that you're saying
 8 is passed out?
 9 **A. Well, I know I had helped drag him out.**
 10 **And then a few minutes later he was up and running**
 11 **around yelling. His girlfriend or wife was in**
 12 **there and -- still in the sweat lodge. And he was**
 13 **concerned for her and wanted to get her out and was**
 14 **trying to get into the sweat lodge to get her out.**
 15 MR. KELLY: Your Honor, I'm going to object.
 16 Speculative as to the intent of this person.
 17 THE WITNESS: Can I expand?
 18 THE COURT: The objection is sustained.
 19 **Q. BY MS. POLK: Did you approach that man?**
 20 Yes or no?
 21 **A. Yes.**
 22 **Q.** And what did you do? Without speculating
 23 about what he was -- his intentions were, what did
 24 you do?
 25 **A. Talked to him and talk -- tried to calm**

1 him -- calm him down until he -- we eventually held
2 him down.

3 Q. And who's "we"?

4 A. Ted and I.

5 Q. Did he calm down?

6 A. He calmed down from his height of
7 excitement to a lower level of excitement.

8 Q. You said -- you said the man had -- that
9 you dragged the man out. How did you become aware
10 that -- what caused you to go to him in the first
11 place to assist him out?

12 A. I -- he had crawled to the door. And
13 when he got to the door, he collapsed. And we -- I
14 dragged him out the rest of the way.

15 Q. And where did you put him?

16 A. Out of the doorway off to the side.

17 Q. How much time passed between the time you
18 dragged him out and put him to the side and he
19 jumped up?

20 A. It wasn't a whole round. I don't know
21 exactly.

22 Q. Were you tending to him between --

23 A. No.

24 Q. -- the time you brought him out and he
25 got up?

1 A. No.

2 Q. Was your attention drawn to another
3 person?

4 A. Yes.

5 Q. And specifically is that person male or
6 female?

7 A. Female.

8 Q. Do you recall when during the ceremony
9 your attention was drawn to a female?

10 A. After.

11 Q. What drew your attention to that person?

12 A. She was -- she was cramping. Her body
13 would cramp up, and she didn't -- she would cramp
14 up.

15 Q. Did you do something for her?

16 A. There was several other people around. I
17 don't know that I did anything personally for her.

18 Q. Did you notice whether her eyes were
19 opened or closed?

20 A. There was a long -- like, maybe 15
21 minutes where she was still on the -- on the scene
22 of the sweat lodge and they were trying to work
23 with her. And at different points her eyes were
24 open or closed.

25 Q. Did you see what happened to her? Was

1 she taken away?

2 MR. KELLY: Your Honor, objection to the form
3 of the question.

4 THE COURT: Sustained.

5 Q. BY MS. POLK: When were you last aware of
6 that woman?

7 A. In the -- or -- yellow house or the
8 kitchen bathroom. She was in the bathtub.

9 Q. Did you see her there?

10 A. Yes.

11 Q. So when you're at the scene of the sweat
12 lodge itself, you were outside. Did you leave her
13 while she was still at the -- at the sweat lodge?

14 A. I went in a golf cart with other people.
15 I drove the golf cart, I think, to the dining hall
16 where the Dream Team and other people put her in a
17 bathtub.

18 Q. Was this woman in the golf cart that you
19 drove?

20 A. I believe so.

21 Q. How did you get from being on the ground
22 with the lady to being in a golf cart with a lady?

23 A. A guy came and picked her up.

24 Q. Did you -- were you taking direction from
25 somebody?

1 A. No.

2 Q. How did you know to get in a golf cart
3 and drive her anywhere?

4 A. They said they wanted -- somebody said he
5 was a doctor, I think, and they wanted to get
6 her --

7 MR. KELLY: Your Honor, I'm going to object.
8 Hearsay.

9 THE COURT: Sustained.

10 Q. BY MS. POLK: Tell the jury, then, where
11 you drove the golf cart with the lady in it.

12 A. Dining hall. Dining hall. There's a
13 bathroom in the dining hall with a bathtub in it.

14 Q. Did you stay with the lady from the time
15 she was in the golf cart to the time she went to
16 the bathtub?

17 A. Yes.

18 Q. Tell the jury what you observed, what you
19 personally observed.

20 A. What I observed was she didn't seem to be
21 in control of her body. Her body was spasming up
22 and, I would say, convulsing on and off. She
23 didn't seem to have control of her body
24 functioning.

25 Q. How long were you with her in the

1 bathroom?

2 **A. Once she got in the bathtub, I left.**

3 **Q.** How did she get into the bathtub?

4 **A. The same guy who carried her in -- onto**

5 **the golf cart, I believe, put her in the bathtub.**

6 **Q.** Did you observe her at all while she was

7 in the bathtub?

8 **A. No. I left. I -- it kind of bothers me**

9 **to see people like that. So I -- the guy said he**

10 **was a doctor, so I -- I left.**

11 **Q.** Did you see that lady later again?

12 **A. I don't know. Not that I recall.**

13 **Q.** Was your attention drawn to another

14 person at any time during or after Mr. Ray's sweat

15 lodge ceremony in 2008?

16 **A. I remember an oriental guy who --**

17 **Oh. Am I supposed to continue.**

18 **Q.** Yes. Was your attention drawn to another

19 person? Yes or no?

20 **A. Yes.**

21 **Q.** And what about that person drew your

22 attention?

23 **A. He didn't know where he was or who he was**

24 **or --**

25 **MR. KELLY:** Your Honor, objection.

1 **THE COURT:** Sustained as to foundation.

2 **Q.** BY MS. POLK: Let me ask you first, when

3 was it that your attention was drawn to this

4 person?

5 **A. After the sweat lodge.**

6 **Q.** And did you have contact with this

7 person?

8 **A. Yes, I did.**

9 **Q.** Why did you have -- why did you -- did

10 you approach the person?

11 **A. Yes.**

12 **Q.** And without telling me what that person

13 was thinking, what did you personally see that made

14 you approach him?

15 **A. He looked like he needed help.**

16 **Q.** Did you render him assistance?

17 **A. I started talking to him.**

18 **Q.** Did he -- did he respond to you?

19 **A. Yes. But not logically.**

20 **Q.** Okay. How long were you with him?

21 **A. Ten minutes.**

22 **Q.** What did you do for him?

23 **A. I talked to him. I got him water and a**

24 **towel.**

25 **Q.** During that ten minutes, did he become

1 appropriately responsive?

2 **A. No.**

3 **Q.** Did you leave him?

4 **A. Yes.**

5 **Q.** And how come?

6 **A. A Dream Team member came up.**

7 **Q.** And did you see that man again later?

8 **A. Yes.**

9 **Q.** Did you talk to him then?

10 **A. Yes.**

11 **Q.** And what did you talk about then?

12 **A. I asked him if -- how he was. And he**

13 **didn't --**

14 **MR. KELLY:** Your Honor, objection. Hearsay.

15 **MS. POLK:** It's not offered for the truth,

16 Your Honor.

17 **MR. KELLY:** And relevance.

18 **THE COURT:** Are you asking for statement of

19 his physical condition? What are you -- what's the

20 question geared to?

21 **MS. POLK:** Yes. How -- well, what he

22 remembers.

23 **THE COURT:** Sustained.

24 **Q.** BY MS. POLK: How long did you have

25 contact with that man later?

1 **A. Five minutes.**

2 **Q.** And where were you when you later had

3 contact with him?

4 **A. The dining hall.**

5 **Q.** Was your attention drawn to another

6 individual at any time during or after

7 Mr. Ray's 2008 sweat lodge ceremony?

8 **A. Yes.**

9 **Q.** And are you thinking of a specific

10 individual?

11 **A. It's hard to think of specifics.**

12 **Q.** Let me ask you this: Did you render

13 assistance to individuals other than those you've

14 already testified about?

15 **A. Probably -- yes.**

16 **Q.** And are you able to recall today -- this

17 is a yes or no question. Are you able to recall

18 today how many people you rendered assistance to?

19 **A. At least a dozen.**

20 **Q.** What sort of assistance did you render to

21 those 12 people?

22 **A. Getting them something to drink or --**

23 **nobody wanted fruit. Getting something to drink, a**

24 **towel or cooling them off or laying them down or**

25 **sitting them up or talking to them or getting a**

1 **Dream Team person over.**
 2 Q. This is a yes or no question. Did you
 3 personally observe anybody vomiting?
 4 A. **Yes, I did.**
 5 Q. And did you observe -- personally observe
 6 other signs of physical distress in participants?
 7 A. **Yes, I did.**
 8 Q. Tell the jury what.
 9 A. **People -- I don't know if that's**
 10 **distress. But they had obviously no control of**
 11 **their bodily functions. People were crying; people**
 12 **were throwing up, passed out; stuff coming out of**
 13 **their face and mouth and crying; not being able to**
 14 **walk, just laying in a ball curled up in a fetal**
 15 **position.**
 16 Q. Did you see that in 2008?
 17 A. **Yes.**
 18 Q. And what do you specifically recall? Do
 19 you recall a person curled up?
 20 A. **Yeah.**
 21 Q. When was your attention drawn to that
 22 person?
 23 A. **After the sweat lodge.**
 24 Q. Did you go to that person?
 25 A. **I don't know if I did help that person**

1 **that I'm -- that I'm thinking of. There were**
 2 **several people -- you saw the pictures. I don't**
 3 **know how to --**
 4 Q. And you just mentioned pictures. Did you
 5 take pictures in 2008 after Mr. Ray's sweat lodge
 6 ceremony?
 7 A. **I took some pictures. Yes.**
 8 Q. When did you take pictures?
 9 A. **It would have been after all of my duties**
 10 **as the assistant door keeper were done.**
 11 Q. Do you recall how much time, between the
 12 end of Mr. Ray's ceremony before you started taking
 13 pictures, how much time had passed?
 14 A. **Approximately 25, 30 minutes.**
 15 Q. Do you recall -- why did you take
 16 pictures?
 17 A. **Because my friend Anita, the other girl**
 18 **in the -- she's from Switzerland. And she wanted**
 19 **to see what the crazy Americans were doing.**
 20 THE COURT: Ms. Polk, we need to take a recess
 21 this morning. So let's do that at this time.
 22 Thank you.
 23 And, ladies and gentlemen, we'll take the
 24 morning recess. We got a late start. Please be
 25 reassembled and ready to begin at 25 after. And

1 then we'll get some time in before noon. Remember
 2 the admonition.
 3 And I want to talk to Ms. Mercer. The
 4 rule of exclusion of witnesses has been invoked,
 5 which means you cannot talk about the testimony
 6 that you're giving or the case at all, communicate
 7 in any way about those things with any other
 8 witness until the trial is completely over.
 9 THE WITNESS: Yes, sir.
 10 THE COURT: And you can't try to do that in
 11 any fashion to a third person. And I know because
 12 family relationships, it's particularly important
 13 that you -- you follow this rule. It's always
 14 important for all witnesses to do that. But you
 15 just cannot communicate with other witnesses in any
 16 way about the case or your testimony.
 17 However, you can talk to the lawyers if
 18 no other witness is present.
 19 Do you understand that?
 20 THE WITNESS: I understand.
 21 THE COURT: Okay. Then you are excused at
 22 this time.
 23 And we are in recess. Thank you.
 24 (Recess.)
 25 THE COURT: The record will show the presence

1 of the defendant, Mr. Ray; the attorneys, the jury.
 2 Ms. Mercer is back on the witness stand, and she's
 3 under oath.
 4 Ms. Polk, you may continue.
 5 MS. POLK: Thank you, Your Honor.
 6 Q. Ms. Mercer, I'm going to show you
 7 Exhibits 841, 842, 843, 844, 845, 846, and 847 and
 8 848, and ask you just to take a moment and look at
 9 them.
 10 Do you recognize those pictures?
 11 A. **Yes, I do.**
 12 Q. And are these the pictures that you took?
 13 A. **Yes, they are.**
 14 Q. Tell the jury about how much time after
 15 Mr. Ray ended his ceremony was it that you took
 16 these pictures.
 17 A. **It was probably 25 to 30 minutes later.**
 18 Q. And you testified about a lady in a fetal
 19 position. Do you see that lady in any of these
 20 pictures?
 21 A. **Yes.**
 22 Q. Can you show me where.
 23 A. **Right here.**
 24 Q. Do you see her in any of the other
 25 pictures?

1 **A. Well, you can't see her there, but**
2 **they're helping her there. Right there.**

3 MR. KELLY: Your Honor, I'm going to ask that
4 the record reflect the exhibit referenced.

5 THE COURT: I think if there's actually going
6 to be a statement from it, that needs to be done,
7 Mr. Kelly.

8 Ms. Polk, so if it's still a question of
9 reviewing the -- the exhibits in general, that's
10 fine. But if there's actually testimony offered, I
11 would like the number as that happens.

12 MS. POLK: Yes, Your Honor.

13 **Q. I'm going to put up on the overhead**
14 **Exhibit 841, one of the exhibits you just**
15 **identified as being the lady in the fetal position.**

16 Will you show the jury the lady you're
17 talking about.

18 And how long -- do you recall how long
19 that lady was in the position like that?

20 **A. After the picture or the whole time?**

21 **Q. The whole time.**

22 **A. Honestly, I don't remember when she got**
23 **up or anything.**

24 **Q. Did you ever approach that lady?**

25 **A. I can't recall at this time.**

1 **Q. And I'm going to put up on the overhead**
2 **Exhibit 847. Do you see her in this picture, as**
3 **well?**

4 **A. Yes. Yes, I do.**

5 **Q. And show the jury where.**

6 Were you aware of other people taking
7 photographs?

8 **A. Yes. I did see other people taking**
9 **photographs. I also know that my friend Anita took**
10 **some of the pictures.**

11 **Q. From your camera?**

12 **A. Yes.**

13 **Q. I want to ask you specifically**
14 **about 2008, Mr. Ray's ceremony. And your testimony**
15 **was you were assistant door keeper. For how much**
16 **of that ceremony were you at the door to the sweat**
17 **lodge?**

18 **A. 80 to 90 percent.**

19 **Q. Did you personally observe where Mr. Ray**
20 **sat during -- inside that sweat lodge during that**
21 **ceremony?**

22 **A. Yes, I did.**

23 **Q. And how did you get to personally observe**
24 **that?**

25 **A. I was directly at the door.**

1 **Q. Where did you see Mr. Ray sitting for the**
2 **ceremony?**

3 **A. He sat to the right in the first position**
4 **inside the door.**

5 **Q. And did you ever have any conversation**
6 **with him?**

7 **A. In 2008?**

8 **Q. Yes.**

9 **A. I can't recall specifically, but I'm sure**
10 **I would have.**

11 **Q. And why are you sure of that?**

12 **A. Because he would have asked for water**
13 **or --**

14 MR. KELLY: Your Honor, objection.
15 Speculative. There's no foundation.

16 THE COURT: Overruled.

17 You may answer that.

18 THE WITNESS: What was the question?

19 **Q. BY MS. POLK: Well, what interaction**
20 **in 2008 are you sure you would have had with**
21 **Mr. Ray?**

22 **A. Because as a door keeper or assistant**
23 **door keeper, that's what you do. You interact with**
24 **the pourer of the sweat lodge.**

25 **Q. And in 2008, you testified about the man**

1 yelling about his girlfriend inside?

2 **A. Yes, I did.**

3 **Q. Did you hear Mr. Ray talk to that man at**
4 **all?**

5 MR. KELLY: Your Honor, objection. Lack of
6 foundation.

7 THE COURT: Sustained.

8 **Q. BY MS. POLK: For 2008 -- I'm going to**
9 **ask you some specific questions, Ms. Mercer -- did**
10 **you see participants vomiting?**

11 **A. Yes, I did.**

12 **Q. Did you see participants --**

13 MR. KELLY: Your Honor, I'm going to object.
14 They're leading questions.

15 THE COURT: Sustained.

16 Ms. Polk, you may rephrase it.

17 And sustained as to -- sustained as to
18 form.

19 **Q. BY MS. POLK: Other than what you've**
20 **already testified about in 2008, what are your**
21 **other observations about participants?**

22 And I want to limit that to just what you
23 saw or heard, not your guess as to what was going
24 on. Don't guess about what was causing it but just
25 what you observed in terms of physical

1 observations.
 2 **A. I saw people throwing up, crying, passed**
 3 **out, upset, cold, hot, distressed.**
 4 MR. KELLY: Objection to the last question.
 5 THE COURT: Just the last word, I'm going
 6 to -- sustained.
 7 MR. KELLY: I'm sorry. The last response.
 8 THE COURT: Not the last response. I think --
 9 MR. KELLY: I think I said question. It was a
 10 response.
 11 THE COURT: Actually, overruled. Overruled.
 12 The objection is overruled.
 13 **Q. BY MS. POLK: And when you say**
 14 **"distressed," what do you mean?**
 15 MR. KELLY: Your Honor, objection.
 16 THE COURT: Overruled.
 17 THE WITNESS: Not healthy. They looked hot
 18 and tired and -- I guess I'm done.
 19 **Q. BY MS. POLK: And for -- talking about**
 20 **the participants who participated in Mr. Ray's**
 21 **sweat lodge ceremony in 2007, other than what**
 22 **you've already testified about, what did you**
 23 **observe about participants?**
 24 MR. KELLY: Your Honor, objection. It's
 25 cumulative.

1 THE COURT: Sustained. That was sustained.
 2 **Q. BY MS. POLK: I'm going to show you**
 3 **Exhibits 875 and 855 and then ask you if you**
 4 **recognize this lady that's in both of these**
 5 **pictures.**
 6 **A. No, I do not.**
 7 **Q. You testified about a lady that you had**
 8 **to put into a golf cart --**
 9 **A. Yes.**
 10 **Q. -- and you took up to the kitchen. Do**
 11 **you recall what year that was?**
 12 MR. KELLY: Your Honor, objection. It's been
 13 asked and answered.
 14 THE COURT: Overruled.
 15 You may answer that.
 16 THE WITNESS: I believe it was 2007.
 17 **Q. BY MS. POLK: And do you recall what**
 18 **that --**
 19 MR. KELLY: Objection. May I voir dire the
 20 witness?
 21 THE COURT: No. Not at -- not at this time,
 22 Mr. Kelly.
 23 Continue.
 24 **Q. BY MS. POLK: Do you recall what that**
 25 **lady looked like?**

1 MR. KELLY: Judge, may we approach?
 2 THE COURT: No.
 3 You may answer that question if you can.
 4 THE WITNESS: I recall her having dark hair.
 5 **Q. BY MS. POLK: The answer --**
 6 **A. Yes.**
 7 MS. POLK: Thank you, Your Honor.
 8 **Q. The question is, yes or no, do you recall**
 9 **what that lady looked like?**
 10 **A. Yes.**
 11 **Q. And will you describe for the jury what**
 12 **you recall about what she -- and I'm not asking**
 13 **about symptoms, just her physical characteristics,**
 14 **what did she looked like.**
 15 **A. What I remember was dark hair and a**
 16 **small-framed body. That's my only description of**
 17 **her.**
 18 **Q. Okay.**
 19 MR. KELLY: Judge, again, I'd ask, two
 20 questions of voir dire.
 21 THE COURT: Not at this time, Mr. Kelly.
 22 You may continue, Ms. Polk.
 23 MS. POLK: Thank you, Your Honor.
 24 **Q. In 2008, Ms. Mercer, did you assist with**
 25 **sweat lodge ceremonies performed by facilitators**

1 other than Mr. Ray?
 2 **A. Yes, I did.**
 3 **Q. And do you recall how many?**
 4 **A. I recall at least three.**
 5 **Q. Do you recall what your role was for**
 6 **those three?**
 7 **A. The door keeper.**
 8 **Q. And as door keeper, were you able to**
 9 **leave the sweat lodge to go have a cigarette?**
 10 **A. If someone else was at the door. But**
 11 **generally I shouldn't do that.**
 12 **Q. Do you recall if you did it for those**
 13 **other ceremonies performed in 2008 at Angel Valley?**
 14 **A. I don't -- I did once.**
 15 **Q. And for the one that you did leave, did**
 16 **you ever get out of sight of the sweat lodge?**
 17 **A. No.**
 18 **Q. Did you ever get out of hearing distance**
 19 **of the sweat lodge?**
 20 **A. No.**
 21 **Q. With respect to those ceremonies, then,**
 22 **in 2008 performed at Angel Valley by facilitators**
 23 **other than Mr. Ray, did you ever observe anybody**
 24 **vomit?**
 25 MR. KELLY: Your Honor, objection. Sixth

1 Amendment.
 2 THE COURT: Overruled.
 3 You may answer that.
 4 THE WITNESS: No. I never observed anyone
 5 vomit.
 6 Q. BY MS. POLK: Did you ever observe
 7 anybody combative?
 8 MR. KELLY: Your Honor, objection. Leading.
 9 THE COURT: Okay. And then the other form --
 10 sustained as to form of the question.
 11 Ms. Polk.
 12 Q. BY MS. POLK: With respect to those
 13 ceremonies performed by persons other than Mr. Ray,
 14 facilitated by persons other than Mr. Ray in 2008,
 15 what did you observe about the participants?
 16 A. Before, during, or after?
 17 Q. Let's take it each --
 18 MR. KELLY: Your Honor, objection.
 19 THE COURT: Just go ahead and phrase a
 20 question, Ms. Polk.
 21 Sustained.
 22 Go ahead and rephrase.
 23 Q. BY MS. POLK: Before the ceremony what
 24 did you observe generally?
 25 MR. KELLY: Your Honor, objection. Relevance.

1 THE COURT: Overruled.
 2 Q. BY MS. POLK: You can answer.
 3 A. What was the question?
 4 Q. What did you observe about participants
 5 at ceremonies facilitated by individuals other than
 6 Mr. Ray in 2008 before the ceremony?
 7 A. There were generally less people.
 8 They -- I don't know if I can say that. They knew
 9 they were -- they were prepared.
 10 MR. KELLY: Your Honor, objection. State of
 11 mind.
 12 THE COURT: Sustained.
 13 THE WITNESS: It was --
 14 Q. BY MS. POLK: And this is limited to what
 15 you observed as opposed to what you believe they
 16 were thinking. What did you observe about them?
 17 A. They were healthy, happy people.
 18 Q. And then during those ceremonies for 2008
 19 facilitated by individuals other than Mr. Ray, what
 20 did you observe about participants during the
 21 ceremony?
 22 A. Participants remained sitting and able
 23 to --
 24 MR. KELLY: Your Honor, objection. It goes
 25 beyond the personal observation.

1 THE COURT: Overruled.
 2 You may answer that. Go ahead and answer
 3 that, ma'am.
 4 Q. BY MS. POLK: They remained sitting.
 5 What else did you observe about them?
 6 A. They remained sitting, talkative, in a
 7 happy group. They were very group oriented, happy,
 8 healthy.
 9 Q. And then with regard to those
 10 participants, what are your observations about
 11 them? Again, we're talking about ceremonies
 12 facilitated by individuals other than Mr. Ray in
 13 Angel Valley in 2008.
 14 What did you observe about the
 15 participants after the ceremony?
 16 A. They expressed gratitude.
 17 MR. KELLY: Your Honor, objection. Hearsay.
 18 THE COURT: Overruled.
 19 THE WITNESS: They were -- they would be very
 20 thankful, express gratitude.
 21 MR. KELLY: Your Honor, same objection. It's
 22 hearsay.
 23 Ask that the answer be stricken.
 24 THE COURT: Counsel, please approach.
 25 (Sidebar conference.)

1 THE COURT: Ms. Polk --
 2 First of all, Mr. Kelly, when the
 3 questions were asked before, we were going right to
 4 the point. This is the problem. You have insisted
 5 that Ms. Polk ask the questions in this fashion.
 6 Now, the other thing, you're saying
 7 that's hearsay. And I'd like a response to
 8 Mr. Kelly's objection that that was hearsay to ask.
 9 MS. POLK: The response -- what she heard
 10 people say is not hearsay. It's not offered to
 11 prove the truth of whatever they're saying. It's
 12 offered to prove what their condition was, what
 13 their physical and the overall condition of
 14 participants.
 15 But the Court is exactly right. If I can
 16 ask, did you observe anybody in distress, did you
 17 observe anybody vomiting, we can get right to the
 18 point.
 19 THE COURT: Keep using words like
 20 "distress" -- you know -- physical or mental -- I'd
 21 like to cover one thing at a time.
 22 "Distress" is a problem, Mr. Kelly. I
 23 don't like the use of that word. Are you asking
 24 that she use that word?
 25 MR. KELLY: I'd renew all of my objections,

1 Judge. The question is, what did you observe. The
2 answer is, they looked fine. Not their state of
3 mind. Not some hearsay response. And I take issue
4 with the Court and counsel when she is allowed to
5 lead them through some predetermined set of
6 physical characteristics she wants to bolster
7 hearsay.

8 THE COURT: Mr. Li requested that, Mr. Kelly.

9 MR. KELLY: It's damaging to my client. The
10 simple response, what did you observe.

11 THE COURT: Are you saying Mr. Li did not say
12 that yesterday?

13 MR. KELLY: Judge, I don't recall. I can't
14 address that.

15 THE COURT: I'm trying to get through,
16 Mr. Kelly, an area quickly. And it's being
17 rendered so much more difficult.

18 MS. POLK: Let me ask -- can I ask how did
19 they look?

20 MR. KELLY: Same as what did you observe.
21 When she starts talking about expressed gratitude,
22 that's not -- that's not even relevance offered for
23 the truth.

24 THE COURT: If you look closely at 803(3) -- I
25 don't want to interject. We're not talking about

1 that. The point was causation and physical effects
2 and her observations with regard to that, so
3 observations with regard to physical effects.

4 MR. KELLY: She said they look fine. Okay.
5 Fine with me. I don't have a problem.

6 MS. POLK: I'll ask how they looked and ask
7 did she render assistance to anybody.

8 MR. KELLY: Objection. Relevance. If they
9 look fine, you don't need to -- why would you
10 emphasize it.

11 THE COURT: The other thing, rendering
12 assistance. It comes out she hands people a drink
13 of water, we just go through that. That's
14 cumulative.

15 (End of sidebar.)

16 THE COURT: Ms. Polk.

17 MS. POLK: Thank you, Your Honor.

18 Q. Ms. Mercer, with respect to those
19 participants who had participated in a ceremony in
20 Angel Valley in 2008 not facilitated by Mr. Ray,
21 how did they look after the ceremony? How did they
22 look?

23 A. **Like they did when they went in.**
24 **Healthy, happy.**

25 Q. Okay. Thank you. Between December -- in

1 September of 2008 when Mr. Ray performed his
2 ceremony at Angel Valley, were you living at Angel
3 Valley?

4 A. **Yes.**

5 Q. And did there come a time that you moved
6 out of the Angel Valley area?

7 A. **Yes.**

8 Q. When was that?

9 A. **We moved off of the property in November**
10 **of 2009.**

11 Q. Did there come a time when you no longer
12 worked for the Hamiltons at Angel Valley?

13 A. **I never worked for Angel Valley as an**
14 **employee. I was a volunteer. But as of -- no. I**
15 **think it was December 2008 I was told my services**
16 **were no longer needed.**

17 Q. And the same for your husband?

18 A. **Yes.**

19 Q. After that did you continue to live on
20 the Angel Valley property? I should -- I didn't
21 ask that well.

22 Did you continue to learn in -- live in
23 Angel Valley?

24 A. **I lived in the area. There are two**
25 **private houses that have nothing to do with Angel**

1 **Valley that are on that property.**

2 Q. And you and your husband continued to
3 live there?

4 A. **Yes. We rented a house from the**
5 **gentleman who owned one of them. He inherited it.**
6 **He doesn't live there.**

7 Q. Did you assist with additional sweat
8 lodge ceremonies in 2009?

9 A. **Yes, I did.**

10 Q. How many?

11 A. **One.**

12 Q. Which one?

13 A. **It was for a woman named Healing Wolf.**

14 Q. And do you recall when that was?

15 A. **In May was the beginning of the year.**

16 Q. Did you do a second sweat lodge ceremony
17 in 2009?

18 A. **Yes, I did.**

19 Q. And whose was that?

20 A. **James Ray International.**

21 Q. Let's talk about the ceremony in 2009
22 facilitated by Mr. Ray. First of all, do you
23 recall --

24 MR. KELLY: Excuse me, Ms. Polk.

25 Judge, at this point in time I request a

1 105 limiting instruction be provided to the jury.

2 THE COURT: What we'll do is go ahead and take
3 the afternoon recess at this time.

4 Ladies and gentlemen, please remember the
5 admonition, of course, and be reassembled at 1:30.
6 I think Ms. Rybar mentioned to you that it is
7 necessary to recess by 4:00. I think she told me
8 that she mentioned that to you.

9 And, Ms. Mercer, you will be excused too,
10 but remember the rule of exclusion I discussed.
11 You have to follow that.

12 Okay?

13 THE WITNESS: Yes.

14 THE COURT: All right. So you are excused and
15 the jury is excused.

16 I'm going to ask the parties to remain a
17 moment.

18 (Proceedings continued outside presence
19 of jury.)

20 THE COURT: The record will show the presence
21 of Mr. Ray and the attorneys. The witness has
22 left. The jury has left.

23 And I've been looking over the proposed
24 instructions. Mr. Kelly, you're -- I wanted to do
25 this rather than have a --

1 MR. KELLY: Yes. And thank you, Judge. And
2 if we're going to address the timing, if there's
3 any objection, I'll address that. But Mr. Li is
4 addressing the substance of the --

5 THE COURT: With regard to the timing, I
6 agreed -- I think the parties agree it needs to be
7 today.

8 MR. KELLY: My point would be, Judge, I
9 believe in listening to the direct examination,
10 other sweat lodge events have been covered. Now
11 we're moving into the JRI 2009. So I believe that
12 this is the appropriate time.

13 THE COURT: Let me ask Ms. Polk.

14 Is that your intention, then, to move on?
15 I see your question has to do with the 2009
16 ceremony now.

17 MS. POLK: Your Honor, I do need to cover
18 the 2009 May ceremony, which is another event, and
19 then I'll move into Mr. Ray's.

20 THE COURT: Mr. Kelly?

21 MR. KELLY: To the extent the -- I was
22 listening carefully, and I preserve my right to
23 object as to whether or not that's cumulative. But
24 if we're going to back up, go through May of '09,
25 then I would request that this instruction be read

1 before she begins the October '09 ceremony,
2 whatever time in the direct that happens.

3 THE COURT: Okay. All right. That seems
4 logical.

5 Ms. Polk?

6 MS. POLK: I agree.

7 THE COURT: Okay.

8 And, Mr. Li, what did you --

9 MR. LI: I don't have anything more to add
10 than what I said this morning.

11 THE COURT: I thought Mr. Kelly indicated.

12 Mr. Hughes, the instruction that you
13 drafted, as I've indicated with just -- and this is
14 what really concerns me about it. It would permit
15 the jury to make use of evidence where, for the
16 specific purpose that we've been discussing and how
17 it's been presented to me, would not be
18 appropriate. It just doesn't -- it doesn't cover
19 those things that would be required to make sure
20 that it's only considered for that -- that limited
21 purpose. The defense instruction is much closer.

22 I have my concerns with that. And I
23 don't know that either side can really help me.
24 But with what I've got now, defense instruction is
25 certainly much closer to giving the guidance that

1 needs to be done rather than just a very -- a bare
2 statement, essentially. You can't consider this as
3 character evidence. It also has to do with what
4 they can consider it for.

5 And you don't really -- other than -- you
6 know -- cause of -- it gets into that mixed notion
7 of cause, some kind of physical causation versus
8 something that relates much more to -- to mental
9 state.

10 So I'm going to have to look at this and
11 come up with something over lunch.

12 Thank you. Be in recess.

13 (Recess.)

14 THE COURT: The record will show the presence
15 of Mr. Ray and the attorneys, not the jury.

16 I did draft, a proposed special
17 instruction.

18 Mr. Li.

19 MR. LI: I'm sorry. Was the Court asking me
20 to address?

21 THE COURT: Yeah. I know you've all read this
22 now. So --

23 MR. LI: I didn't want to be presumptuous,
24 Your Honor.

25 THE COURT: Okay.

1 MR. LI: Well, there's two points that I'd
2 like to make about this instruction. The first is
3 that the Court made a ruling in February that was
4 very specific about the purposes to which evidence
5 could be used and could not be used.

6 One of the specific findings that the
7 Court made in February was that the evidence that
8 we've heard, again, was not sufficient to put
9 anybody on notice of a life-threatening condition.

10 And I think because the Court has made
11 that ruling, even by a lower standard, which is a
12 clear and convincing standard, the Court -- the
13 instruction should actually instruct the jury.
14 So -- because that's exactly the ruling that the
15 Court made.

16 The second point that I think is very
17 important is in the last sentence -- that you may
18 only consider -- you know -- the evidence. I
19 would urge the Court to adopt the sentence that we
20 had used, which is that you may only consider the
21 evidence from those prior sweat lodge ceremonies,
22 if believed, as it may relate to whether the state
23 has proven beyond a reasonable doubt that the
24 decedent died of heat stroke and not a different
25 cause.

1 And the reason is because this -- one,
2 that's an accurate statement of the law. And when
3 we instruct the jury, I mean, there's no reason not
4 to state that that's actually what the rules are.

5 The second point is the jury needs to
6 understand this isn't just sort of a 50/50
7 balancing test. The defense has actually no
8 burden. And we cannot have the jury sitting here
9 listening to all this evidence and with -- you
10 know -- questions about whether Ms. Do has shown
11 any evidence to various people. They cannot be
12 left with the impression that the defense has some
13 burden to prove a cause of death other than heat
14 stroke.

15 It is, in fact, the state's burden to
16 prove the cause of death was heat stroke beyond a
17 reasonable doubt. And I think it needs to say
18 that, because right now they may be under the
19 misimpression that it's just sort of a -- you
20 know -- one side has -- the defense has to prove
21 something and the state has to prove something, and
22 then when you -- you know -- when you evaluate this
23 evidence, you can figure out which one you think is
24 more likely. And that's not -- that's not the law.
25 And I think we should instruct the jurors as to

1 exactly what the law is.

2 I'm not suggesting, Your Honor, that this
3 language in the Court's instruction -- I just want
4 to be clear. I'm not suggesting that the language
5 in the Court's instruction says, hey. You can
6 balance this any way you want.

7 I just think that the state -- or the
8 state's burden has to be articulated to the jurors
9 so that they understand that when they're hearing
10 all this evidence of people throwing up and the
11 like, that they're not supposed to just sit there
12 and guess, well, that seems like it might be like
13 heat stroke, and it's a 50/50. We'll figure out
14 that -- you know -- we'll see what the defense can
15 prove. I think we have to articulate what the
16 burden actually is.

17 And just to go back to the first point
18 about knowledge, one of the concerns here is that
19 as we hear all this evidence coming in about these
20 prior acts -- you know -- there is a question
21 raised as to what -- you know -- I'm sure in the
22 minds of the jurors as to what Mr. Ray's state of
23 knowledge is.

24 I think we need to be absolutely clear
25 that not only can they not consider any of this

1 for Mr. Ray's knowledge but that the Court has
2 explicitly found that this exact evidence does not
3 provide notice.

4 And I'm -- you know -- our original
5 instruction was drafted directly from the Court's
6 order. It's not sufficiently similar to the
7 medical conditions associated with the deaths
8 in 2009 to put a person on notice of substantial
9 risk in 2009. We drafted it directly from the
10 Court's order. If that's the order, if that's the
11 only purpose that this particular evidence can be
12 used, it should say so.

13 And that's our request, Your Honor, is
14 that we -- we put back in that sentence about --
15 you know -- that not sufficiently similar to the
16 medical conditions associated in 2009 to put a
17 person on substantial -- risk of substantial --
18 sorry -- notice of substantial risk of death
19 in 2009.

20 And that the last sentence also be
21 modified to indicate that the state has a burden to
22 prove beyond a reasonable doubt, which they do, the
23 causation of this death -- these deaths and that
24 those -- the causation is heat stroke. That's
25 their burden. And this instruction should say so.

1 THE COURT: Thank you, Mr. Li.

2 MR. LI: Thank you, Your Honor.

3 THE COURT: Mr. Hughes.

4 MR. HUGHES: Your Honor, the state has
5 reviewed the Court's proposed limiting instruction
6 and -- with one, I think, minor exception, we
7 believe it's -- it's appropriate and do not object
8 to it being given.

9 With respect to the defendant's argument
10 that there should be this preamble that's contained
11 within the defendant's proposed instructions,
12 again, the preamble is not appropriate for the
13 reasons the state expressed earlier today.

14 105 provides for a limiting instruction
15 to limit its proper scope. It doesn't talk about a
16 preamble. And, again, such a preamble would be
17 confusing because it's referring to an evidentiary
18 hearing that occurred prior to the jury hearing the
19 evidence, refers to different testimony than the
20 jury has heard.

21 With respect to the Court's proposed
22 instruction, the only change the state would ask is
23 in the very final sentence, which says to whether
24 the physical cause of death of the decedents was
25 heat stroke or some other physical cause.

1 A concern -- and it hasn't come yet, but
2 I'll tell the Court where it's going. Dr. Mosley
3 has a semantical difference of opinion from
4 Dr. Lyon.

5 THE COURT: That's come up. And here's why I
6 put the language the way it is. It's also really
7 in response to what Mr. Li is bringing up.

8 The other is multiorgan failure or
9 something due to -- and so the state isn't --

10 Is that the semantical difference you're
11 talking about?

12 MR. HUGHES: That's one of two, Your Honor.
13 The semantical difference is Dr. Mosley. And I'm
14 referring to Exhibit 362, which is the autopsy
15 report, indicated Ms. Neuman died as a result of
16 multisystem organ failure due to hyperthermia, due
17 to prolonged sweat lodge exposure.

18 I think if instead of saying -- and then
19 the other issue is Dr. Lyon had -- in addition to
20 the cause of death of heat stroke for Mr. Shore, he
21 also indicated a cause of death of -- of the heart
22 condition.

23 Your Honor, I think it would be better
24 to -- and more accurate to limit that final
25 sentence. Instead of saying cause of death was

1 heat stroke, it could say cause of death was
2 related to heat exposure or some other physical
3 cause.

4 I think that would address the semantical
5 difference between the two medical examiners and
6 would also address the possibility, as Dr. Lyon
7 testified, that the exposure to the heat may have
8 aggravated or sped up the heart condition that
9 Mr. Shore was one -- that was one of the causes of
10 death of Mr. Shore.

11 MR. LI: Your Honor, may I respond?

12 THE COURT: Yes. Please focus.

13 MR. LI: Okay. It will be brief. With
14 respect to the cause of death, No. 1, Dr. Lyon did
15 not testify that Mr. Shore died of heart-related
16 thing. He simply said it was possible but he
17 didn't know.

18 Secondly, I think it's fairly easy for
19 Dr. Mosley to say it's simply semantics difference,
20 which he has said --

21 THE COURT: I know. I did not -- I knew that
22 was the state's argument. I'm not saying it's
23 semantic. I'm not saying that. But I just wanted
24 to let Mr. Hughes know. I know the general issue
25 that can come up and that if it just said heat

1 stroke or one other thing, the state's not saying
2 it's necessarily heat stroke.

3 In your view, it could be something -- In
4 your view, it's heat stroke or it's -- and it's a
5 semantical difference or it's not a semantical
6 difference. And there's it is. And here's what
7 I --

8 Go ahead, Mr. Li. I interrupted you.
9 What else did you want to say?

10 MR. LI: Well, I think it's critical that the
11 state be put to its burden and that the jury be
12 alerted to the fact that it's still the state's
13 burden to prove beyond a reasonable doubt that the
14 decedents died of heat stroke. I don't think we
15 can say heat exposure because that -- that is
16 really lowering the bar.

17 THE COURT: Mr. Li, again, just to try to get
18 right to the point on this.

19 MR. LI: Yes.

20 THE COURT: Mr. Hughes, I was concerned about
21 when you put these other things down there, they're
22 going to be equated. And they're not equated. In
23 the 404(b) they were not equated. With Dr. Lyon
24 they were not equated. There's some testimony
25 about a spectrum or a continuum. That's why

1 there's evidence to this effect.

2 The language you're suggesting would --
3 would destroy that mark when you -- when you really
4 cross over into the life-threatening condition of
5 heat stroke. So I was concerned about that
6 suggestion.

7 MR. HUGHES: Your Honor, I think Dr. Mosley is
8 going to explain that -- that hyperthermia is also
9 a life-threatening condition that is fatal. Again,
10 it's a semantical difference.

11 The defense is suggesting that we now
12 have the burden of proving that it was heat stroke
13 and perhaps not hyperthermia that caused the death.
14 It's the state's burden to show Mr. Ray caused the
15 deaths. And that's what the evidence, in the
16 state's opinion, has lead to at this point.

17 However, to say that we have a burden of
18 proving that he caused the deaths by heat stroke
19 and no other way is to limit the state's case and
20 it's to limit, improperly limit, the scope of the
21 evidence so far. And that likely is to come in
22 from Dr. Mosley and from the state's medical
23 expert. That's where I'm coming from.

24 "Heat stroke" is the term that Dr. Lyon
25 chose to use. Dr. Mosley is going to, I believe,

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1 choose to use the term "hyperthermia" along with
2 that other verbiage I read from the exhibit.

3 The jury instruction appears to limit it
4 to heat stroke, which is not what the evidence will
5 be when Dr. Mosley --

6 THE COURT: No. It does not. It says heat
7 stroke or some other physical cause. So there's no
8 limitation there. It could be another physical
9 cause that the state is suggesting or one that's
10 really just a semantic difference. So I think
11 that language preserves that in my view,
12 Mr. Hughes. And that's why I put it in that
13 disjunctive.

14 MR. HUGHES: I understand. And that was the
15 only issue that we wanted to make with respect to
16 the proposed instruction. Otherwise we believe
17 it's fair and appropriate.

18 Again, to put in additional comment on
19 burden of proof on particular issues, the jury
20 already had the preliminary jury instructions that
21 explain the state's burden of proof but -- on all
22 elements of the case. The jury will be given those
23 same instructions or similar instructions as to
24 burden of proof when the case is over.

25 On Rule 105, it doesn't talk about

1 reciting the whole litany of all the jury
2 instructions over and over again. It's a specific
3 rule that deals with the scope that a jury can give
4 a particular piece of evidence. And we believe
5 that the Court's proposed instruction other than
6 that one area, which I've made the record on,
7 targets that scope and targets Rule 105.

8 THE COURT: Address your other point too about
9 to the preface, because I think the preface is
10 necessary. I think the jury needs to be focused
11 right in on what we're talking about, not just
12 loosely sweat lodge ceremonies are going to think
13 back. It has to relate to what's happened in the
14 court in the last three days.

15 I think it's appropriate, and I think it
16 should be flagged that ultimately what's at issue
17 is one sweat lodge ceremony. And there's a limited
18 purpose they can consider this other evidence for
19 if they wish. So I think the preface should be in
20 there.

21 Mr. Li.

22 MR. LI: And by the "preface," you mean the --
23 the current -- as currently drafted or what's --

24 THE COURT: I think what -- Mr. Hughes still
25 didn't like the way I started -- I have mentioned

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1 some evidence.

2 I think you were first suggesting that
3 should not be in there.

4 MR. HUGHES: No, Your Honor. I apologize. I
5 didn't express my opinion correctly. I heard
6 Mr. Li in his argument asking for the original
7 preface in the defendant's.

8 THE COURT: All right. Mr. Li, you were
9 speaking. Go ahead.

10 MR. LI: Your Honor, I will focus in on the
11 last section. I mean, obviously we still believe
12 that there should be -- the Court did rule that the
13 physical conditions were not sufficiently similar,
14 et cetera, to put somebody on notice of substantial
15 risk of death in 2009. The Court did rule that.

16 And we think that there's no prejudice
17 whatsoever to the state to actually put that into
18 this instruction because that is, in fact, the law
19 of the case.

20 The second point is, with respect to the
21 burden of proof, the state should embrace the
22 burden of proof. In fact, this is -- it is the law
23 that the state must prove beyond a reasonable doubt
24 the causation.

25 The Court, in fact, did not read the

1 causation instruction even though we requested the
2 causation instruction at the beginning of the case.
3 The state objected to the causation instruction.
4 It was never read to the jury. We think that there
5 has been a very big case now put up about
6 causation.

7 We now have had three days of testimony,
8 the sole purpose of which, as I understand the
9 state's theory, is causation. And we need to
10 instruct the jury about the law of causation.
11 There's absolutely no prejudice to the state to
12 tell the jurors that there is a burden of proof.
13 The state should embrace the burden of proof. It
14 is their constitutional obligation. They should --
15 they should absolutely embrace it.

16 And so as a consequence, Your Honor,
17 we -- I think the last paragraph -- the last
18 paragraph needs to have that concept, that the
19 state must prove beyond a reasonable doubt that the
20 physical cause of death was heat stroke.

21 THE COURT: Well, what I -- what I will do is
22 put in a separate paragraph, just the general
23 statement that the state has the burden of proof as
24 to the elements of an offense or something like
25 that. That's what I think should be in there.

1 MR. LI: May I make one point, Your Honor.
2 And I know --

3 THE COURT: Make your full record.

4 MR. LI: I know I'm stepping on your time, and
5 I don't want --

6 THE COURT: There's no problem with that,
7 Mr. Li.

8 MR. LI: Okay.

9 THE COURT: Please feel free to make your
10 record.

11 MR. LI: The problem is that in the beginning
12 of the case, we asked for a full causation
13 instruction which said that not only does the state
14 need to prove each element of the case beyond a
15 reasonable doubt, but with respect to causation,
16 they need to prove that there was not a
17 superseding, intervening cause, which we have now
18 put at issue in this case very firmly and to which
19 now the state is attempting to rebut by
20 purportedly -- I mean -- you know -- we all have
21 our difference about this. But by putting on
22 this prior act evidence.

23 And our --

24 THE COURT: That's okay.

25 MR. LI: By putting on these --

1 THE COURT: It may be prior act. It's --
2 again, we've had that discussion. But go ahead.

3 MR. LI: That they're putting on evidence
4 relating to prior sweat lodges, and that evidence
5 purports to rebut our contention that the state has
6 failed its burden of proof in showing that a
7 superseding, intervening cause, for instance,
8 organophosphates or some other poison, caused these
9 people to die.

10 They have to prove, as the law holds
11 here -- and there's a jury instruction on point to
12 which the state objected to in the opening set.
13 There is a jury instruction that says the state
14 must not only prove causation, but they must prove
15 beyond a reasonable doubt that a superseding,
16 intervening cause did not cause the decedents to
17 die.

18 And so to simply say well, there's a --
19 does the state have to prove each element beyond a
20 reasonable doubt is not enough because they have to
21 prove causation and they also have to prove that
22 nothing else caused it.

23 And so the way this instruction -- the
24 way our instruction was originally drafted is
25 intended to recite what the law actually is, that

1 the state now has put all this evidence in
2 purporting to address.

3 And so what we're concerned about, Your
4 Honor, is that while we appreciate the Court's
5 efforts in this -- in this instruction, we think it
6 needs to be more because if it doesn't say that,
7 then the jury may have confusion or
8 misunderstanding about what this evidence can
9 actually be used for. I think it needs to be
10 absolutely clear, Your Honor.

11 And the last thing, Your Honor, there's
12 no prejudice to the state to simply state what the
13 law is. Literally there is no prejudice. It is
14 the law.

15 THE COURT: And I mentioned before that the
16 instructing might -- it might be a process because
17 of some of the more complicated issues in the
18 ruling.

19 At this time I am going to put a reminder
20 in about the state's burden as to all elements of
21 an offense. And with regard to putting -- you
22 know -- a special instruction in the
23 preliminaries -- I'm not saying just because it
24 hasn't been done it shouldn't be. But you need to
25 see the evidence.

1 And you're saying, Mr. Li, well, there
2 has been. And there has been.

3 So I will think of that. And it's
4 possible that there may be a supplement. But for
5 now I'm just going to add the one statement that
6 the state has -- well, give me the language for a
7 general statement.

8 MR. LI: Off the top of my head, Your Honor,
9 it would be -- you know -- the state has the burden
10 of proof to prove each and every element including
11 causation beyond a reasonable doubt. I would then
12 ask --

13 THE COURT: But Mr. Hughes has hit the point
14 there. I made a very point clear to say we're
15 talking about physical cause here as opposed to
16 legal causation. And that's the problem, and
17 that's what's complicating it. So --

18 MR. LI: Cause in fact. But, Your Honor,
19 that's exactly why this instruction should say that
20 the state has the burden to prove beyond a
21 reasonable doubt. You may only consider this in
22 deciding whether the state has met its burden --
23 you know -- to prove beyond a reasonable doubt the
24 cause of death for the decedents was heat stroke
25 and not a different cause.

1 MR. HUGHES: Your Honor, there is a RAJI
2 instruction on causation. It's withstood scrutiny
3 quite a few times. And if the Court is inclined to
4 add a causation instruction to this, I would ask
5 that the RAJI causation instruction be provided.

6 THE COURT: And that's already been -- well,
7 it's not the instruction, but I mean, the whole
8 definition of beyond a reasonable doubt is there,
9 and it, essentially, has the Portillo language.

10 MR. HUGHES: And that would be the reasonable
11 doubt instruction. I believe it's --

12 THE COURT: Oh. Beyond a reasonable -- yeah.
13 They're combined. That's right. They're combined.

14 MR. LI: Off the top of my head, Your Honor, I
15 think it's 2.03, the causation, reasonable -- the
16 causation instruction is -- I believe it's 2.03,
17 2.03.

18 MR. HUGHES: Your Honor, again, I think
19 there's a difference between the burden of proof
20 instruction and the causation instruction.

21 THE COURT: There is.

22 MR. HUGHES: And I believe if there's going to
23 be an addition, it should be the RAJI burden of
24 proof instruction. To go into the causation
25 instructions, I think at some point we might as

1 well just give them at end of trial the entire jury
2 instructions.

3 THE COURT: I'm not -- I'm not going to give a
4 causation instruction. It's confusing the
5 concepts. It's blurring the concepts to do that.

6 So that means -- what I'm going to do
7 is -- as I have provided it, that's -- the three
8 paragraphs as I've given it, that's what I'm giving
9 at this time. I'm not going to add any additional
10 language.

11 Thank you.

12 Oh, just make a note that I am filing the
13 defense proposed instruction and the state's
14 proposed instruction. And, of course, the -- this
15 one will be filed as well. This will all be on
16 record.

17 Thank you.

18 (Recess.)

19 (Proceedings continued in the presence of
20 jury.)

21 THE COURT: The record will show the presence
22 of the defendant, Mr. Ray, the attorneys, and the
23 jury.

24 The witness, Ms. Mercer, has returned to
25 the witness stand and is under oath, of course.

1 Ms. Polk, when you're ready.

2 MS. POLK: Thank you, Your Honor.

3 Q. Good afternoon, Ms. Mercer.

4 A. **Good afternoon.**

5 Q. Right when we took our break, we were
6 finishing with the -- we were starting to talk
7 about the two ceremonies that were held at Angel
8 Valley in 2009. And you had testified that you had
9 a role at a ceremony in May of 2009?

10 A. **Yes. I did.**

11 Q. And that was a ceremony facilitated by
12 somebody other than Mr. Ray?

13 A. **Yes, it was.**

14 Q. With respect to that particular ceremony,
15 did you get a chance to observe the participants
16 before they went into the sweat lodge?

17 A. **Yes, I did.**

18 Q. And how did they look?

19 A. **They looked happy, healthy, ready to do a
20 sweat lodge.**

21 Q. Do you recall approximately how long that
22 ceremony lasted?

23 A. **Maybe an hour, hour and a half.**

24 Q. And were you present at the end of that
25 ceremony?

1 **A. Yes.**
 2 **Q.** And did you get an opportunity to look at
 3 the participants when the ceremony was over?
 4 **A. Yes, I did.**
 5 **Q.** Did you see any participants while the
 6 ceremony was going on?
 7 **A. Yes, I did.**
 8 **Q.** And how did they look?
 9 **A. They looked like they were having a good**
 10 **time. They were in groups, singing, chanting,**
 11 **talking, hugging.**
 12 **Q.** Did you see the participants in that
 13 ceremony when the ceremony was over?
 14 **A. Yes, I did.**
 15 **Q.** How did they look then?
 16 **A. Everyone -- the people I observed were**
 17 **happy and grateful, a lot of hugging going on, a**
 18 **lot of real eye contact, of feeling like it was a**
 19 **spiritual connection, a lot of hugging and**
 20 **gratitude.**
 21 MS. POLK: Your Honor, at this time the state
 22 would request the reading of the instruction?
 23 THE COURT: Mr. Kelly?
 24 MR. KELLY: I agree.
 25 THE COURT: Okay.

1 Ladies and gentlemen, I have a special
 2 instruction to give you at this time. As I have
 3 mentioned, some evidence is relevant only for
 4 limited purposes.
 5 In the past three days, you have heard
 6 evidence of circumstances at sweat lodge ceremonies
 7 that took place prior to the 2009 sweat lodge
 8 ceremony, which is the only sweat lodge ceremony
 9 that is at issue in this case.
 10 You must not consider any of that
 11 evidence regarding prior sweat lodge ceremonies, if
 12 believed, to draw any inference regarding Mr. Ray's
 13 knowledge of any risk of death in 2009. You also
 14 must not consider that evidence regarding prior
 15 sweat lodge ceremonies, if believed, to draw any
 16 inference regarding Mr. Ray's intent, character, or
 17 conduct in 2009.
 18 You may only consider that evidence from
 19 those prior sweat lodge ceremonies, if believed, as
 20 it may relate to whether the physical cause of
 21 death of the decedents was heat stroke or some
 22 other physical cause.
 23 MS. POLK: Thank you, Your Honor.
 24 **Q.** Ms. Mercer, I'd like to now talk about
 25 October 8th of 2009. Were you present at Angel

1 Valley on that date?
 2 **A. Yes, I was.**
 3 **Q.** And were you present at the site of the
 4 sweat lodge?
 5 **A. Yes, I was.**
 6 **Q.** And tell the jury who facilitated that
 7 sweat lodge ceremony.
 8 **A. James Ray International.**
 9 **Q.** Will you tell the jury what your role was
 10 for that ceremony.
 11 **A. I was the door keeper for that sweat**
 12 **lodge.**
 13 **Q.** I'm going to put up on the overhead
 14 Exhibit 145. Do you see yourself in this
 15 photograph?
 16 **A. Yes, I do.**
 17 **Q.** Will you show the jury where you are.
 18 **A. That is me.**
 19 **Q.** And do you recall what was happening when
 20 this photograph was taken?
 21 **A. I don't recall, but I can tell.**
 22 **Q.** What can you tell?
 23 **A. We were holding the energy of the sweat**
 24 **lodge.**
 25 **Q.** What does that mean?

1 **A. Because it's a spiritual ceremony, the**
 2 **energy is created in the sacred space beforehand to**
 3 **not let any negative energy in. And then we hold**
 4 **the energy for the participants in the sweat lodge**
 5 **of love and caring and compassion and -- and just**
 6 **try and surround it with love and good energy.**
 7 **That's what I was doing. I'm not sure if that's**
 8 **what a Native American sweat lodge is, but that's**
 9 **what I was doing.**
 10 **Q.** Okay. Do you know the other people who
 11 are seen in this photograph? I just underlined a
 12 couple.
 13 **A. They look like all Dream Team. I see**
 14 **Ted.**
 15 **Q.** Where's Ted?
 16 **A. Right here drinking water. I can't tell.**
 17 **That might be Anita in the back, but I'm not sure.**
 18 **Q.** Did you know the other Dream Team members
 19 before this event started?
 20 **A. Oh, I've seen them and -- but I only knew**
 21 **Megan by name. They always wore -- mainly they**
 22 **wore blue shirts. So that's how you identified**
 23 **them.**
 24 **Q.** Who did you understand Megan to be?
 25 **A. James Ray's assistant. And Josh.**

1 **Although I never spoke to Josh. I only spoke to**
 2 **Megan.**
 3 **Q.** Throughout the ceremony where did you
 4 remain?
 5 **A.** **Right there. Right where the picture**
 6 **indicates. I was at the door to the lodge.**
 7 **Q.** And just generally describe what your job
 8 was.
 9 **A.** **My job was to stay at the door and listen**
 10 **for James to call for the door to be opened and**
 11 **then to respond to what his requests were.**
 12 **Q.** For example, what?
 13 **A.** **For example, to get more rocks or for**
 14 **water or for the door to be closed, as well as**
 15 **to -- if people were entering or exiting -- I mean,**
 16 **if people were exiting, to make sure they did not**
 17 **go into the fire area and directed them away**
 18 **from -- I would direct them away from the fire.**
 19 **Q.** Did you sit during that time?
 20 **A.** **Yes.**
 21 **Q.** Where would you sit?
 22 **A.** **Right there. Right at the front of the**
 23 **door.**
 24 **Q.** What did you sit on?
 25 **A.** **The ground.**

1 **Q.** How did that door get opened?
 2 **A.** **I would open it.**
 3 **Q.** How did you open it?
 4 **A.** **I would lift up the blankets that were**
 5 **part of the door and throw it over, just throw it**
 6 **over the side. It kind of laid off to the side**
 7 **when it was open.**
 8 **Q.** And when the door was open, were you able
 9 to see inside the sweat lodge?
 10 **A.** **If I stuck my head in a little. But if**
 11 **you're right here, you can see like -- you know --**
 12 **just right here. But I would peek my head in**
 13 **occasionally.**
 14 **Q.** And why would you peek your head in?
 15 **A.** **To see what was going on, just to look.**
 16 **Q.** Do you know where Mr. Ray sat during the
 17 ceremony?
 18 **A.** **He sat to the right of the door in the**
 19 **first position.**
 20 **Q.** I'm going to put up on the overhead
 21 Exhibit 414, which is just a simple diagram. Do
 22 you see where the entrance is on that exhibit?
 23 **A.** **Yes, I do.**
 24 **Q.** Will you show the jury where Mr. Ray sat.
 25 **A.** **Here.**

1 **Q.** And how do you know he sat there?
 2 **A.** **I saw him.**
 3 **Q.** Ms. Mercer, when the door to that sweat
 4 lodge is closed, were you able to hear anything
 5 from inside?
 6 **A.** **Yes.**
 7 **Q.** And when the door was open, were you able
 8 to hear anything inside?
 9 **A.** **Yes, I was.**
 10 **Q.** When the door was closed, was it
 11 difficult to hear anything inside?
 12 **A.** **I could hear -- I was tuned to hear James**
 13 **Ray call for the door to be opened. I could hear**
 14 **things that were going on. It was muffled, and I**
 15 **could not hear everything as clear as it was when**
 16 **the door was open. But I could hear what was going**
 17 **on.**
 18 **Q.** Once the door was open, who would ask you
 19 to close the door?
 20 **A.** **James Ray.**
 21 **Q.** And how did you close the door?
 22 **A.** **I would reach over and just pull it back**
 23 **and then make sure -- you know -- all the edges**
 24 **were covered and no light was getting in.**
 25 **Q.** Do you recall how many times Mr. Ray

1 asked for the door to be opened during the
 2 ceremony?
 3 **A.** **Seven.**
 4 **Q.** Do you recall how many rounds Mr. Ray
 5 held?
 6 **A.** **Eight.**
 7 **Q.** How was it determined how many rocks
 8 would come into the sweat lodge for each round?
 9 **A.** **James Ray.**
 10 **Q.** And how would he -- how would you know
 11 what he wanted?
 12 **A.** **He would call out for so many**
 13 **grandfathers.**
 14 **Q.** Let's see if we can walk through this
 15 round by round. Do you -- are you able to recall
 16 today when this photograph was taken where the
 17 participants were?
 18 **A.** **They were inside.**
 19 **Q.** And do you recall how they got inside?
 20 **A.** **They --**
 21 **Q.** Did you see them go in?
 22 **A.** **Yes, I did.**
 23 **Q.** Where were you as they were going in?
 24 **A.** **At -- I was at the door. I'm trying to**
 25 **remember if I helped in the saging process.**

1 **Because the people would stand outside the sacred**
2 **space, get saged, and then walk in -- and then go**
3 **in the lodge. And I was at the door.**

4 Q. Do you recall how long it took the
5 participants to get inside the sweat lodge?

6 A. **At this one?**

7 Q. Yes.

8 A. **No.**

9 Q. And once everybody was in, what would
10 happen next? What -- let's start at the beginning
11 of the ceremony. You testified that people got
12 saged?

13 A. **Yes.**

14 Q. Now, were you aware of a gathering at
15 another fire by participants before they went in?

16 A. **Yes.**

17 Q. And where were you when that went on?

18 A. **I believe I was in the sacred space. I**
19 **don't remember if that year he called us over to**
20 **join in the -- or be around -- because they would**
21 **have a circle and talk and then burn their**
22 **intentions. I can't recall if that year I was**
23 **standing around there or if I was at the fire.**

24 Q. Okay. And then from the burning of the
25 intentions, what did the participants do?

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1 A. **Then they would go into the lodge.**

2 Q. Once they were in, what happened next?

3 A. **James would call for grandfathers.**

4 Q. When the participants went in, were there
5 any rocks inside the sweat lodge?

6 A. **No.**

7 Q. Do you recall, then, before that
8 beginning of the first round the door would still
9 be open before Mr. Ray calls for the rocks?

10 A. **Yes. The door is open. I mean,**
11 **everybody gets in, and then he calls for rocks, and**
12 **the rocks are put in, and then the door is closed.**

13 Q. When Mr. Ray calls for rocks for the
14 first round, are you the person who was being
15 spoken to?

16 A. **Yeah. He kind of yelled it so Ted could**
17 **hear it. But yeah. Usually I'll repeat it to Ted**
18 **and go over and say 10 or 12 or whatever it was he**
19 **wanted.**

20 Q. Do you recall how many grandfathers or
21 how many rocks Mr. Ray called for to start the
22 sweat lodge ceremony?

23 A. **I believe it was 10 or 12.**

24 Q. Who was helping, then, pull the rocks out
25 of the fire and get them into the pit?

1 A. **Rotillo.**

2 Q. Was your daughter --

3 A. **Ted. And Sarah was helping dust the**
4 **rocks off and then move them into the sweat lodge.**

5 Q. Do you see the area on this photograph of
6 where rocks were dusted off?

7 A. **Yes, I do.**

8 Q. Can you show us?

9 A. **Uh-huh.**

10 Q. Let's see if I can zoom in on that.

11 A. **It's just, like, a rock that we could put**
12 **the hot lava rock on and then -- yeah. See?**
13 **There's the pitchfork. I don't see the broom,**
14 **though. It's just a little -- you know -- hand**
15 **whisk broom. And you would just brush off the**
16 **ashes, the hot ashes.**

17 Q. So while that's going on, where were you?

18 A. **I would be moving between getting the**
19 **rocks from the dusting off area. I'd be back and**
20 **forth in this area.**

21 Q. In between rounds?

22 A. **Uh-huh.**

23 Q. And then once the rounds started, where
24 would you go?

25 A. **To the door.**

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1 Q. Where was the water that was used inside
2 the sweat lodge?

3 A. **Right here.**

4 Q. Who was filling up those buckets for this
5 ceremony?

6 A. **Ted or I.**

7 Q. How did you fill up those buckets?

8 A. **Where the hose -- well, the spigot was**
9 **actually way back over here, but we dragged the**
10 **hose all the way around. Actually, we had one**
11 **going that way and one going this way.**

12 Q. Did you -- do you know who it was,
13 Ms. Mercer, who -- once the rocks are in the pit,
14 do you know who it was who then would pour water on
15 the rocks?

16 A. **James Ray.**

17 Q. And did you see him do that?

18 A. **No. That was usually done when the door**
19 **was closed. I could hear it, though, and I**
20 **could --**

21 Q. Tell the jury what you could hear.

22 A. **Well -- and it was unusual because --**
23 MR. KELLY: Your Honor, I would object. It's
24 nonresponsive.

25 THE COURT: Sustained.

1 Q. BY MS. POLK: And I'll ask you about the
2 other ceremonies but --

3 A. Okay.

4 Q. First of all, tell the jury what you
5 could hear when Mr. Ray was putting water on the
6 rocks.

7 A. **I could hear the sizzle of the water. I
8 guess I don't know for sure that -- I mean, I did
9 not see him personally put the water on. But I
10 know that's what they do.**

11 Q. And is that based on your assistance at
12 other ceremonies?

13 A. Yes.

14 Q. At other ceremonies was some sort of
15 utensil or vessel used to put water on those rocks?

16 A. Yes.

17 Q. And explain that to the jury.

18 A. **A big soup ladle. It's got a long handle
19 and -- you know -- not maybe a whole cup, but
20 almost a cup of water.**

21 Q. Was that different than what you saw
22 Mr. Ray do?

23 MR. KELLY: Your Honor, objection. Lack of
24 foundation.

25 THE COURT: Sustained.

1 Q. BY MS. POLK: For the water that you
2 passed in to Mr. Ray for the ceremony in 2009 --

3 A. Yes.

4 Q. -- was there a ladle or a vessel?

5 A. No.

6 Q. Just the bucket?

7 A. **Yes. I brought a ladle, but it wasn't
8 used.**

9 MR. KELLY: Your Honor, objection.

10 THE COURT: Sustained.

11 Q. BY MS. POLK: Do you recall, Ms. Mercer,
12 how many times you or your daughter filled up the
13 buckets for this ceremony in 2009?

14 A. **I believe there were three buckets there
15 that we were using them for putting into the lodge
16 and we filled them up at least twice.**

17 Q. All three?

18 A. Yes.

19 Q. When you helped with other ceremonies,
20 how often, if at all, did you fill up the buckets
21 of water after the initial buckets?

22 A. **We did not.**

23 Q. Are you able to recall today the first
24 round of Mr. Ray's 2009 ceremony? I'll ask you a
25 different question.

1 Let's talk about the first round. You
2 testified about rocks and water going in.

3 A. Yes.

4 Q. Let me ask you this: How does that
5 bucket of water get from its position there to
6 somebody inside the sweat lodge?

7 A. **I hand it to James Ray.**

8 Q. Is that what you did to start the first
9 round?

10 A. Yes.

11 Q. Does that bucket come out before you
12 close the door?

13 A. No.

14 Q. Specifically, then, for this ceremony
15 in 2009, after you had sent the rocks in and the
16 water in and you closed the door, do you recall how
17 the ceremony began from there?

18 A. **It began as normal. He would, I believe,
19 call in the angels or the directions of the four
20 winds. He'd begin by talking.**

21 Q. Do you recall the first round coming to
22 an end?

23 A. Yes.

24 Q. And were you asked to open the door?

25 A. Yes.

1 Q. And did you?

2 A. Yes.

3 Q. Do you recall how long that door was open
4 after that first round?

5 A. **The door was open 8 to 10 minutes.**

6 Q. Did Mr. Ray ask for some more rocks?

7 A. **Yes, he did.**

8 Q. Do you recall how many?

9 A. **12.**

10 Q. Do you recall if additional -- if more
11 water went in?

12 A. **No. No water went in.**

13 Q. How does a bucket that has been emptied?
14 How is it passed out to you when that happens?

15 A. **James Ray.**

16 Q. Do you recall, then, the beginning of the
17 second round?

18 A. Yes.

19 Q. And do you recall the end of the second
20 round?

21 A. Yes.

22 Q. When that round ended, what do you recall
23 happening? The second round.

24 A. **Oh, I would say 12 people came out of the
25 sweat lodge. And during the time we were getting**

1 **more rocks -- we would get more rocks. And then**
 2 **James asked if anyone else wanted to come back in.**
 3 **And then he started the round again.**

4 **Q.** At some point did you become aware of a
 5 lady at the -- who had come out who was at the
 6 entrance of the sweat lodge?

7 **A. Yes.**

8 **Q.** When was that?

9 **A. I believe it was the second or third**
 10 **round. She came out relatively early.**

11 **Q.** And when she first came out, did you
 12 observe anything about her?

13 **A. She was upset. She was crying and she**
 14 **was upset and saying that she was disappointing**
 15 **James Ray and thought she should be back in there.**

16 **Q.** And did you pay attention to her?

17 **A. I was just aware of her. But then I**
 18 **became more aware and concerned because I saw two**
 19 **Dream Team people trying -- I saw two Dream Team**
 20 **people pushing her with their hands on her back. I**
 21 **mean, they weren't pushing her, but they were**
 22 **trying to convince her to go back into the sweat**
 23 **lodge. She was at the door. Actually, she was**
 24 **before the door, and they're saying, it's okay.**
 25 **You can do it. And she got to the door and she**

1 **said, no, I can't.**

2 **And that's when they put their hands on**
 3 **her and said, you can. You can -- you know -- and**
 4 **got her to go down. But then she still was saying,**
 5 **no. No.**

6 **And that's -- at that point I said, she**
 7 **doesn't want to go in. I said that to the Dream**
 8 **Team. And then they let her go back to the side.**
 9 **But she was still very upset that she was**
 10 **disappointing James Ray.**

11 **Q.** Where were you when you told the Dream
 12 Team members to leave her alone, essentially?

13 **A. Right there.**

14 **Q.** And where was Mr. Ray?

15 **A. He was inside.**

16 **Q.** Was the door open or closed?

17 **A. It was open.**

18 **Q.** And did you hear Mr. Ray respond in any
 19 way to her?

20 **A. Not that I recall.**

21 **Q.** Do you recall if Mr. Ray said anything to
 22 his Dream Team members?

23 **A. About that girl?**

24 **Q.** Yes.

25 **A. No, I don't.**

1 **Q.** After that at some point, Ms. Mercer, did
 2 you assist people in leaving the sweat lodge?

3 **A. We're talking the third round still?**

4 **Q.** Right.

5 **A. Yes.**

6 **Q.** And describe to the jury what you were
 7 doing.

8 **A. Between rounds the door would open, and**
 9 **people who wanted to leave would leave. Often they**
 10 **would get to the door and then not be able to go**
 11 **any further and kind of collapse. Feel the intense**
 12 **difference in temperature, I would imagine. But**
 13 **for some reason they get to the door and fall down.**
 14 **We would -- I would drag them away from the door**
 15 **over to an area off to the side.**

16 **Q.** Do you see that area on the photo that's
 17 on the overhead?

18 **A. Here.**

19 **Q.** During that time could you hear Mr. Ray
 20 saying anything to the participants?

21 **A. He would encourage -- I heard Mr. Ray**
 22 **encourage the participants to stay tough, stay on**
 23 **the course. You're not your body. You're more**
 24 **than that. Play full on. Things like that.**

25 **Q.** When you -- you talked about assisting

1 people who had collapsed at the entrance?

2 **A. Yes.**

3 **Q.** Where was Mr. Ray when you were doing
 4 that?

5 **A. Sitting inside the sweat lodge.**

6 **Q.** And in terms of how close those people
 7 were to Mr. Ray, can you tell the jury.

8 **A. Directly in front of him.**

9 **Q.** At some point did you become aware of a
 10 man screaming?

11 **A. Yes.**

12 **Q.** Do you recall when that was?

13 **A. I think it was the third or fourth round,**
 14 **maybe the fifth, somewhere after that.**

15 **Q.** When did you first become aware of
 16 someone screaming?

17 **A. When he was screaming.**

18 **Q.** Where were you?

19 **A. At the door.**

20 **Q.** And where was the screaming coming from?

21 **A. You want me to point on there?**

22 **Q.** Yes.

23 **A. He was laying right about here.**

24 **Q.** That person who was screaming -- were you
 25 aware of them before he -- that person came out of

1 the sweat lodge?
 2 **A. I can't recall. I probably drug him out.**
 3 **But I don't recall. I just -- I just remembered**
 4 **him screaming.**
 5 **Q. And what do you remember him saying?**
 6 **A. He was screaming he was going to die. He**
 7 **didn't want to die. And he was having a heart**
 8 **attack. And things were getting dark. And that**
 9 **kind of thing. But really screaming and really**
 10 **loud.**
 11 **Q. Do you know the name of that person?**
 12 **A. No.**
 13 **Q. Was the door to the sweat lodge open or**
 14 **closed when you --**
 15 **A. It was open.**
 16 **Q. Where was Mr. Ray?**
 17 **A. Directly inside the door.**
 18 **Q. Did you hear Mr. Ray say anything to that**
 19 **man?**
 20 **A. Yes, I did.**
 21 **Q. What do you recall Mr. Ray saying?**
 22 **A. I recall him asking, who is that? What's**
 23 **that noise out there? And I didn't -- he was**
 24 **looking at me. And I didn't know the person's**
 25 **name. And I said, someone was -- someone was**

1 **having an -- or someone was hurt or -- someone**
 2 **calling for help. I don't know who it was.**
 3 **And then one of the Dream Team came over**
 4 **and said it was so-and-so and told James it's**
 5 **so-and-so. And James got real loud and directed**
 6 **him, like, the same things. You're more than that.**
 7 **It's a good day to die. You'll be okay.**
 8 **Q. Where was --**
 9 **A. I remember saying, it's a good day to**
 10 **live.**
 11 **Q. Did you say that out loud?**
 12 **A. Yes, I did.**
 13 **Q. Who did you direct that to?**
 14 **A. James Ray.**
 15 **Q. Did he respond to you?**
 16 **A. No.**
 17 **Q. And did Mr. Ray ever come out of the**
 18 **sweat lodge to check up on the man before he said**
 19 **that?**
 20 **A. No.**
 21 **Q. Did you -- do you know what happened to**
 22 **that man? Did you focus on him or track him?**
 23 **A. No.**
 24 **Q. Did you become aware of a man who had**
 25 **fallen into the pit?**

1 **A. Yes.**
 2 **Q. Do you recall when that was?**
 3 **A. I don't think it was during -- I -- my**
 4 **recollection is I thought the door had just closed**
 5 **and -- because I heard somebody saying, no. Stop**
 6 **him. And then I heard a commotion and then, open**
 7 **the door. Open the door. And then a gentleman**
 8 **came out with a burned arm, skin hanging off of his**
 9 **arm.**
 10 **Q. Do you recall who said, open the door?**
 11 **Open the door?**
 12 **A. It was several people.**
 13 **Q. It was not Mr. Ray?**
 14 **A. He could have -- I mean, he could have.**
 15 **But it was more that there was obvious a commotion.**
 16 **Q. Did you open the door then?**
 17 **A. Yes.**
 18 **Q. And did you see how the man got out?**
 19 **A. I think he was crawling.**
 20 **Q. Did you see if anybody was assisting him?**
 21 **A. I don't think so.**
 22 **Q. What did you --**
 23 **A. Not that I recall.**
 24 **Q. Do you know that man's name?**
 25 **A. No.**

1 **Q. And did you see where that man went?**
 2 **A. Yes.**
 3 **Q. Where did he go?**
 4 **A. He went and sat over on a tarp on the**
 5 **side.**
 6 **Q. Did you get a chance to see the man's arm**
 7 **or body?**
 8 **A. Yes, I did.**
 9 **Q. And describe for the jury what you saw.**
 10 **A. I saw skin coming off of his -- what**
 11 **appeared to be skin coming off of arm all -- you**
 12 **know -- like, all right here and on his hand. And**
 13 **then one of the Dream Team put a towel around it**
 14 **and that -- I knew that's not a good thing to do to**
 15 **a burn.**
 16 **And at the same time, Fawn said, get that**
 17 **off of it, and she ran and got a bucket of ice**
 18 **water, and he put his whole arm into the bucket of**
 19 **ice water that Fawn brought.**
 20 **Q. When Fawn went to get the bucket of ice**
 21 **water, where were you?**
 22 **A. At the door.**
 23 **Q. Do you recall when the next round started**
 24 **in relationship to Fawn going to get the water?**
 25 **A. It started -- I believe it started**

1 **shortly after that. I can't recall. There wasn't**
2 **a long delay before it started.**

3 **Q.** Did Mr. Ray ever come out to check up on
4 the man with the burned arm?

5 **A. No.**

6 **Q.** Did he start the next round?

7 **A. Yes.**

8 **Q.** Are you able to recall the number of
9 rocks specifically today that Mr. Ray called for
10 for his rounds?

11 **A. Like, right now I couldn't say -- you**
12 **know -- what each round was. But I know that**
13 **generally they were above 8, except for one round I**
14 **think he did 4. But they were -- the majority were**
15 **8, 10, 12.**

16 **Q.** And do you recall specifically how many
17 rocks Mr. Ray called for for his last round? If
18 you recall.

19 **A. I don't recall, but I -- it was more than**
20 **the -- when he said four, I thought he was going to**
21 **keep them low, but then they went high again.**

22 **Q.** Did you pay attention to the man with the
23 burned arm after that?

24 **A. No.**

25 **Q.** Do you know if he ever went back inside

1 the sweat lodge?

2 **A. I did see him go back in the lodge.**

3 **Q.** When was that?

4 **A. The last round.**

5 **Q.** Do you know whether Mr. Ray said anything
6 to the man as he went back in for the last round?

7 **A. No, I don't.**

8 **Q.** Did you at some point -- I guess you've
9 testified that you dragged people out from out --
10 from the sweat lodge over to the tarps?

11 **A. Yes, I did.**

12 **Q.** And before the sweat lodge was over, so
13 during the ceremony in between rounds, how many
14 people did you drag out and take over to tarps?

15 **A. During the whole lodge?**

16 **Q.** Yes. Not -- not counting what happened
17 afterwards, but just the whole ceremony itself.

18 **A. I would say I dragged out probably 10. I**
19 **assisted probably 25.**

20 **Q.** Did you ever drag out anybody who was
21 unconscious before the ceremony was over?

22 **MR. KELLY:** Your Honor, object to the form.

23 **THE COURT:** Sustained.

24 **Q.** **BY MS. POLK:** Did you ever drag out --
25 let me ask you this: For the 10 that you dragged

1 out, why did you drag them out?

2 **A. They were passed out.**

3 **Q.** And how did you become aware that they
4 needed your assistance to get out?

5 **A. Somebody would drag them to the door.**
6 **And then I would take them from the door out. And**
7 **they were there motionless, passed out. I would**
8 **take them out the door.**

9 **Q.** And where were you put them?

10 **A. Over to the side.**

11 **Q.** And for those 10 people that you dragged
12 out who were motionless, how close were those 10
13 people to Mr. Ray?

14 **A. They were always directly in front of**
15 **him. Because the direction that you were supposed**
16 **to exit was going back around in front of him. So**
17 **to leave the lodge, you had to -- to leave the**
18 **lodge in the proper fashion that he indicated, you**
19 **had to pass in front of James Ray.**

20 **Q.** Do you recall whether Mr. Ray ever said
21 anything about the 10 people that you dragged out
22 who were passed out?

23 **A. No.**

24 **Q.** At some point could you hear a
25 conversation inside the sweat lodge concerning a

1 particular person?

2 **A. I heard several conversations.**

3 **Q.** The first conversation that you heard --
4 about when was it?

5 **A. By the fifth or sixth round.**

6 **Q.** Where were you when you heard this
7 conversation?

8 **A. At the door.**

9 **Q.** Was the door open or closed?

10 **A. It was open.**

11 **Q.** And tell the jury what you heard.

12 **A. I heard somebody tell James that -- I**
13 **heard a man tell James Ray that somebody, who I**
14 **guess was next to them, was not doing so well. And**
15 **James said, really?**

16 **And they said, yeah. I can't get her to**
17 **respond.**

18 **And James said, she -- I don't know if**
19 **these are the exact words, but to the effect of,**
20 **she's been down this road before. She'll be okay.**

21 **Q.** Where were you when you heard that
22 conversation?

23 **A. At the door.**

24 **Q.** And could you see inside who was
25 speaking?

1 **A. I could tell what direction it was coming**
2 **from, but I couldn't see the person or see who they**
3 **were talking about.**

4 **Q.** I'm going to put up on the overhead
5 Exhibit 414. Will you indicate for the jury the
6 direction that that conversation came from.

7 **A. Okay. I was here. The first**
8 **conversation was in this area.**

9 **Q.** And where was Mr. Ray?

10 **A. Right here.**

11 **Q.** You testified that it was a male voice
12 that you heard say -- are you sure it was a male
13 voice, first of all?

14 **A. I'm pretty sure.**

15 **Q.** And what did you hear that person say?

16 **A. That so-and-so -- they said their name --**
17 **isn't doing so well.**

18 **Q.** Do you recall today what the name was?

19 **A. No. I'm really bad with names. I'm**
20 **sorry.**

21 **Q.** And how do you know that it was Mr. Ray
22 who responded to that voice?

23 **A. I was next to him.**

24 **Q.** And did you actually see Mr. Ray speak?

25 **A. I can't say I was looking at him, but I**

1 **heard his voice, and it came from the area he was**
2 **sitting. So yeah.**

3 **Q.** And what did he say?

4 **A. He said that she'd been down the road**
5 **before -- something to the effect of that she'd**
6 **been down the road before and that she'd be okay --**
7 **or she's where she needs to be.**

8 **Q.** Did you respond in any way?

9 **A. No.**

10 **Q.** Did that concern you?

11 **A. Yes.**

12 **Q.** At the time?

13 **A. Yes.**

14 **Q.** And did you do anything?

15 **A. No.**

16 **Q.** And why not?

17 **A. James Ray is in charge of the lodge and**
18 **the people in the lodge.**

19 **Q.** And after Mr. Ray said that she knows
20 what she's doing, how soon after that were you
21 asked to close the door?

22 **A. I can't say exactly, but it was normal**
23 **interval. So six to eight minutes.**

24 **Q.** Did you ever hear any conversations from
25 within the sweat lodge about a person needing to

1 use the bathroom?

2 **A. Yes.**

3 **Q.** About when did you hear that?

4 **A. Second or third round.**

5 **Q.** And tell the jury what you remember about
6 that.

7 **A. I remember a fellow saying, James, I**
8 **should have asked you this ahead of time. But what**
9 **do we do if we have to go to the bathroom?**

10 **Q.** And did Mr. Ray respond?

11 **A. Yes, he did.**

12 **Q.** What do you recall him saying?

13 **A. Let it go where you're at.**

14 **Q.** Did you hear anything more?

15 **A. No. I was -- well, can I elaborate? I**
16 **was surprised because usually we take them**
17 **somewhere to go to the bathroom.**

18 **Q.** For other sweat lodge ceremonies?

19 **A. Yeah. Even, like, a 2007 I walked**
20 **somebody to the bathroom who asked to go to the**
21 **bathroom. But this time I heard him tell them to**
22 **pee in the lodge.**

23 **Q.** So for a -- the 2007 ceremony facilitated
24 by Mr. Ray, you assisted someone to use the
25 bathroom?

1 **A. Yes. A girl.**

2 **Q.** You testified about hearing Mr. Ray
3 encourage people with expressions -- with phrases
4 such as, you're more than that. How often did you
5 hear Mr. Ray say that for this 2009 ceremony?

6 **A. Very often. More than in the previous**
7 **sweat lodges.**

8 **Q.** Okay. Did you hear it throughout the
9 entire ceremony?

10 **A. Yes.**

11 **Q.** At some point did you later -- did you
12 come to know a person named James Shore?

13 **A. Yes.**

14 **Q.** And, Ms. Mercer, do you recall whether
15 you ever observed Mr. Shore do anything during the
16 ceremony?

17 **A. Yes.**

18 **Q.** What round was that?

19 **A. Sixth or seventh.**

20 **Q.** Tell the jury what you recall.

21 **A. He drug somebody to the door for me to**
22 **take further.**

23 **Q.** How do you know it was Mr. Shore that
24 you're talking about?

25 **A. I remember the face.**

1 Q. Do you know who it was that Mr. Shore
2 brought to the door?
3 A. No.
4 Q. And was it male or female?
5 A. **Couldn't tell you.**
6 Q. How close to the door did Mr. Shore bring
7 that person?
8 A. **He came from this way and to the -- right**
9 **about here.**
10 Q. And what did you do then?
11 A. **And then I took the person from him and**
12 **took him outside.**
13 Q. Where did you take the person?
14 A. **Over to that -- to that same area on --**
15 **on the tarps.**
16 Q. Was that person alert?
17 A. No.
18 Q. Describe to the jury what you remember
19 about the person that Mr. Shore brought to the
20 door.
21 A. **I don't remember anything other than a**
22 **person that -- them being passed out and me moving**
23 **them over there.**
24 Q. And after you dragged them over to a side
25 away from the door, what did you do?

1 A. **I went back to the door to see if there**
2 **was anymore -- I think someone else came out after**
3 **that, and James went back in.**
4 Q. James Shore?
5 A. Yes. James Shore.
6 Q. Did you see James Shore as he went back
7 in?
8 A. Yeah.
9 Q. And did you see anything in particular
10 about him?
11 A. **I know -- well, when he got to this point**
12 **when he was bringing someone, he knocked his head**
13 **on a tree -- on the top of a -- because he tried to**
14 **stand up and he knocked his head. So he had a**
15 **little scratch on his head.**
16 Q. Where was Mr. Ray when you saw Mr. Shore
17 bump his head?
18 A. **Right here.**
19 Q. As you took the person from James Shore,
20 did you see what James Shore did?
21 A. **No. I don't recall.**
22 Q. After bumping his head, did James Shore
23 come out of the sweat lodge?
24 A. **I remember seeing him go back in. I**
25 **think he -- my recollection is he went -- he never**

1 **came out totally out right then. He went back in.**
2 **And I don't -- I don't remember him out -- in here.**
3 **I remember him in here.**
4 Q. Okay. Did you hear anymore conversations
5 coming from the sweat lodge during the ceremony?
6 A. Yes.
7 Q. And tell the jury what else you heard.
8 A. **Before the last round -- before the last**
9 **round, I heard somebody in this area over here -- I**
10 **heard him say so-and-so is not breathing or they're**
11 **not responding. I can't get him to respond.**
12 Q. Do you recall if that was a male or a
13 female voice saying so-and-so is not breathing?
14 A. **I can't recall.**
15 Q. Do you recall if that voice used the name
16 of the person who was not breathing?
17 A. **Yeah. They did.**
18 Q. Do you remember the name?
19 A. No.
20 Q. What do you recall the person saying
21 about someone not breathing?
22 MR. KELLY: Your Honor, objection. Misstates
23 her testimony. The response was "not responding."
24 THE COURT: Overruled.
25 Q. BY MS. POLK: You can go ahead and

1 answer.
2 What do you recall the voice saying that
3 you heard from this area?
4 A. **I'm sorry. I'm getting emotional. I**
5 **remember them saying -- I can't recall right now.**
6 **My brain -- can I review my transcript or**
7 **something?**
8 Q. You can. Would you -- do you -- would
9 you like to take a little break?
10 A. **Yeah. I think my brain is getting fried.**
11 THE COURT: We'll take a recess.
12 Ladies and gentlemen, we'll go ahead and
13 take an afternoon recess. Again, we'll probably be
14 recessing a little bit before 4:00, in any event.
15 So please be back in 15 minutes. Remember the
16 admonition.
17 Ms. Mercer, just remember that rule of
18 exclusion.
19 Thank you. We're in recess.
20 (Recess.)
21 (Proceedings continued outside presence
22 of jury.)
23 THE COURT: The record will show the presence
24 of Mr. Ray and the attorneys.
25 Mr. Kelly.

1 MR. KELLY: Judge, right before the break I
2 objected to a question asked by Ms. Polk and --
3 MR. LI: I have it.
4 MR. KELLY: Well, now my note keeps scrolling
5 upwards. I don't know how to get it back.
6 Judge, here's the problem -- I'm going to
7 summarize. And you're looking at the actual
8 testimony, but --
9 THE COURT: What do you recall the person
10 saying about someone not breathing? That question?
11 MR. KELLY: And the witness said, I can't
12 recall. And then in the next question there's an
13 improper form of the question. And it says, do you
14 know the name of the person who was not breathing?
15 That was not the witness's testimony.
16 And then she responds by saying, I don't
17 know her name. And it's importing an improper and
18 critical fact in this case by misstating the
19 response. I objected based on the fact that it
20 misstates the evidence. Then we took a break.
21 And, again, Judge, it's like I mentioned
22 this morning, these continued improper form of
23 questions, somewhat leading questions, is creating
24 a significant concern.
25 THE COURT: Mr. Kelly, let me go through the

1 question. It says, do you recall -- you know.
2 THE REPORTER: Do you want me to read it?
3 THE COURT: Can you do that?
4 THE REPORTER: Sure.
5 MR. KELLY: If I may, Judge, just to focus on
6 the transcript. What I recall the initial question
7 was something like, did you hear something from
8 this location on Exhibit 140?
9 THE COURT: Something about a voice saying
10 so-and-so is not breathing. Is that -- the witness
11 says, I can't recall.
12 Do you recall if that voice used the name
13 of the person who was not breathing?
14 Yeah. They did.
15 Do you recall the name?
16 No.
17 Is this in the area?
18 MR. KELLY: Right. So the question keeps
19 implying that the response is that she hears the
20 person -- she hears the statement that the female
21 is not breathing. And that's not the case.
22 MR. LI: Your Honor, I actually remember the
23 record. Where it is is actually a few questions
24 before and --
25 THE COURT: Let me scroll up.

1 MR. LI: The question is, did you hear
2 anything inside there?
3 The witness says something to the effect
4 of, I heard somebody say she -- someone's not --
5 so-and-so is not breathing or not responding. I
6 don't recall.
7 And then the next question from Ms. Polk
8 is, when you heard somebody say that somebody
9 wasn't breathing, what -- you know -- what did you
10 do next? Or something like that.
11 THE COURT: Okay. Yeah. I see what you mean,
12 Mr. Li. The objection came sometime later. But it
13 was, did you hear any more conversations coming
14 from the sweat lodge during the ceremony?
15 Yes.
16 And tell the jury what else you heard.
17 Something last round. I heard somebody
18 in this area over here. I heard him say so-and-so
19 is not breathing or they're not responding. I
20 can't get him to respond.
21 Okay. Do you recall if that female voice
22 saying so-and-so is not breathing?
23 I can't recall.
24 Oh. Mr. Kelly, you did say it was not
25 responding. And I just -- I didn't get -- it was

1 almost a screen or so above, and I didn't see that.
2 So -- no. It's a rather important -- it's very,
3 very significant -- you know -- distinction. That
4 needs to be -- that needs to be addressed. It
5 does. Not breathing and not responding is
6 tremendous -- tremendous difference.
7 You heard me go through that, Ms. Polk,
8 and --
9 MS. POLK: I do. But I don't understand the
10 objection.
11 THE COURT: Well, your questioning of what do
12 you recall the person saying about someone not
13 breathing, and the initial response started out,
14 not breathing but then was revised to not
15 responding. That was -- that was the distinction.
16 And I've told the jurors before on these
17 things -- you know -- listen to the question
18 closely. But when I looked up, I saw a number of
19 questions about breathing before the objection.
20 And by that time it had lost the train of it being
21 changed from breathing to responding.
22 So the prior testimony was not that the
23 person was not breathing. It was really that she
24 was not responding.
25 MS. POLK: And, Your Honor, when she gets back

1 on the stand, I'll start over and just have her
2 talk about the conversations. But what I
3 understood her to say is that what she heard was
4 so-and-so is not breathing or not responding. Not
5 that she was saying the person -- she wasn't
6 correcting herself. She was just saying she heard
7 a conversation about somebody not breathing or not
8 responding. That's the way I understood it.

9 THE COURT: I heard her say so-and-so is not
10 breathing or they're not responding.

11 MS. POLK: Correct.

12 THE COURT: And your follow-up questions
13 became, though, like it was all not breathing.

14 MS. POLK: Well -- and I'll -- Your Honor,
15 I'll go back when she gets back on and just ask her
16 open-ended questions about what she heard.

17 MR. KELLY: Judge, that's my point. It's
18 direct examination. It needs to be a series of
19 open-ended question without emphasizing or
20 repeating the response from the witness as to each
21 and every prior question.

22 And in this particular circumstance is
23 extremely critical. But it happens repeatedly
24 where Ms. Polk summarizes the response from the
25 previous question and in asking the next question.

1 We go through that. And when it's critical
2 testimony like this, it can be highly prejudicial.

3 My second concern, Judge, is that under
4 801(d)(2), statements of my client are admissible
5 clearly but not generalized with what a witness
6 believes the statement may be. And there are
7 specific statements only admissible.

8 THE COURT: Mr. Kelly, the point does need to
9 be clarified. I agree.

10 Looking at these questions, though,
11 sometimes if you don't put some kind of label on
12 there or some kind of identifier -- and I agree if
13 it's repeated, there -- there's been repetition of
14 certain points.

15 But Ms. Polk, you indicated you will pick
16 up that and clarify that.

17 If you're talking about two or three
18 persons and you're talking about who might be
19 speaking --

20 Ms. Polk, you understand the point.

21 We'll bring the jury in. Thank you.

22 (Proceedings continued in the presence of
23 jury.)

24 THE COURT: The record will show the presence
25 of Mr. Ray, the attorneys, and the jury.

1 Ms. Mercer has returned to the stand.

2 Ms. Polk.

3 MS. POLK: Thank you, Your Honor.

4 Q. Ms. Mercer, I'm going to show you some
5 more photographs. This is Exhibit 511, 527 --

6 And Your Honor, can I ask if 527 has been
7 admitted?

8 THE COURT: I'll check that.

9 527 has not.

10 MR. KELLY: No objection to 527.

11 THE COURT: Then 527 is admitted.

12 (Exhibit 527 admitted.)

13 Q. BY MS. POLK: I'm also going to show you
14 319 and just ask you, first of all, if you
15 recognize what's in these photographs.

16 A. Yes, I do.

17 Q. And you had testified about James Shore
18 bumping his head?

19 A. Yes.

20 Q. Are you able to see in these photographs
21 the area inside the sweat lodge where Mr. Shore
22 bumped his head?

23 A. From the inside picture you can't see
24 because this looks like it's towards the back. But
25 it's -- he bumped into one of those.

1 Q. Okay. I'll put them up on the overhead
2 and see if you can show the jury.

3 First of all, I'll put up the
4 Exhibit 319. And what do you recognize that to be?

5 A. That's the door.

6 Q. And are you able to show the jury using
7 this photograph where James Shore was when he
8 bumped his head?

9 A. He was inside the lodge. I would say
10 about right here.

11 Q. And I'm going to put up on the overhead
12 Exhibit 527. Do you recognize what part of the
13 sweat lodge this is?

14 A. That actually looks -- I mean, it's
15 inside the lodge.

16 Q. What did James Shore bump his head on?

17 A. One of these sticks going across the top.

18 Q. I was asking you about what you heard
19 from inside the sweat lodge. Did you hear a
20 conversation during Mr. Ray's ceremony about the
21 participants inside?

22 A. Yes, I did.

23 Q. How many conversations did you hear?

24 A. Two.

25 Q. And have you already testified about one?

1 **A. Yes.**
 2 **Q.** And just looking at the exhibit that's on
 3 the overhead -- I think this is 414. That first
 4 conversation -- show the jury where in the sweat
 5 lodge you heard it come from.
 6 **A. This area.**
 7 **Q.** Do you recall around what round you heard
 8 that first conversation?
 9 **A. I think it was the fifth or sixth. It**
 10 **was about the middle or end.**
 11 **Q.** Did you hear a second conversation about
 12 the participants in the sweat lodge?
 13 **A. Yes, I did. At the seventh round.**
 14 **Q.** The seventh round. Do you recall if that
 15 second conversation you heard was before or after
 16 Mr. Shore had dragged somebody to the entrance?
 17 **A. It was after.**
 18 **Q.** Show the jury on this overhead where this
 19 second conversation came from.
 20 **A. This area here.**
 21 **Q.** What do you recall first hearing?
 22 **A. I recall a male voice saying, James. And**
 23 **he said two names, aren't breathing. I can't get**
 24 **them.**
 25 **And James said, really?**

1 **Q.** Now, you've used two -- let me just back
 2 you up. You heard a male voice speak. And where
 3 were you?
 4 **A. At the door.**
 5 **Q.** Was the door opened or closed?
 6 **A. It was open.**
 7 **Q.** And what did you hear that person say?
 8 **A. I heard him say so-and-so -- they said**
 9 **their names, but I don't recall their names. They**
 10 **said, they're not breathing or not responding.**
 11 **And James Ray said, really?**
 12 **And they said, yes. I can't get him to**
 13 **respond.**
 14 **And James Ray said, they're where they**
 15 **need to be. There's only one more round. They'll**
 16 **be okay till the end.**
 17 **Q.** Where were you when you heard that?
 18 **A. At the door.**
 19 **Q.** What happened next?
 20 **A. They closed the door and started another**
 21 **round. Well, he asks if anyone else outside wants**
 22 **to come back in and -- but then another round was**
 23 **started.**
 24 **Q.** And who closed the door?
 25 **A. I closed the door.**

1 **Q.** At whose direction?
 2 **A. James Ray's direction.**
 3 **Q.** Were you concerned then?
 4 **A. Yes.**
 5 **Q.** And what did you do?
 6 **A. The lodge -- the sweat lodge was still**
 7 **having another round. I sat by the door.**
 8 **Q.** Do you recall how many rocks were brought
 9 in for that -- was this the last round, then?
 10 **A. Yes.**
 11 **Q.** And how many rocks were brought in?
 12 **A. I want to say ten.**
 13 **Q.** Do you recall that last round?
 14 **A. You mean during it? What was going on**
 15 **during it?**
 16 **Q.** Yes.
 17 **A. Yes.**
 18 **Q.** Where were you for the last round?
 19 **A. At the door.**
 20 **Q.** And then what happened?
 21 **A. After the sweat lodge?**
 22 **Q.** Yes. Well, what happened for the rest of
 23 that round? Anything? Did you hear anything more?
 24 **A. It was him going through the sweat lodge.**
 25 **There was not as -- there wasn't very many people**

1 **talking at that point. It was mostly James.**
 2 **Because during some of the rounds they're**
 3 **asked to shout out things they want to release or**
 4 **get rid of. And -- you know -- sometimes that**
 5 **would be really loud. But it was just pretty quite**
 6 **towards the end.**
 7 **Q.** Do you recall how long that last round
 8 ended?
 9 **A. How long it ended?**
 10 **Q.** How long it went for, I mean. How long
 11 it lasted.
 12 **A. I can't say.**
 13 **Q.** Do you recall it coming to an end?
 14 **A. Yes.**
 15 **Q.** And were you asked to open the door?
 16 **A. Yes.**
 17 **Q.** By whom?
 18 **A. James Ray.**
 19 **Q.** Who was the first person to come out?
 20 **A. James Ray.**
 21 **Q.** Did you see him as he came out?
 22 **A. Yes, I did.**
 23 **Q.** And what did you observe about him?
 24 **A. He crawled out the entrance, stood up,**
 25 **took a few deep breaths, said something -- I don't**

1 **remember what he said. And then he walked by the**
 2 **guy who was -- thought he was dying and said**
 3 **something to him. And then he went and sat down in**
 4 **the shade on the chairs.**

5 Q. You've testified about other people
 6 crawling or needing assistance?

7 A. Yes.

8 Q. Did Mr. Ray crawl or need assistance?

9 A. No.

10 Q. Did you hear what he said to the guy?
 11 You said he stopped and spoke to a participant.
 12 Did you hear what he said?

13 MR. KELLY: Your Honor, I'm going object.
 14 It's been asked and answered. She couldn't recall.

15 THE COURT: Overruled.

16 If you can, answer that, personal
 17 knowledge.

18 THE WITNESS: I don't remember the exact
 19 words, but something to the effect --

20 MR. KELLY: Same objection.

21 THE COURT: Sustained.

22 THE WITNESS: No. I don't recall.

23 Q. BY MS. POLK: Okay. After Mr. Ray came
 24 out, what happened? Did other people come out?

25 A. **Other people exited the sweat lodge.**

1 Q. And what did you do?

2 A. **We would -- I would direct them to stay**
 3 **low and crawl over to an area away from the fire.**
 4 **Because the concern was people coming out would go**
 5 **into the fire area. So -- and a lot of times they**
 6 **would come from down low and hot and stand up. So**
 7 **I'd ask them to stay low so they could get to**
 8 **the tarps.**

9 Q. Did you assist anybody come out the
 10 front?

11 A. Yes.

12 Q. And did you go inside the sweat lodge to
 13 assist anybody?

14 A. No.

15 Q. Describe for the jury how you assisted
 16 people out the front.

17 A. **Again, people would -- somebody inside**
 18 **the sweat lodge would drag them to the door. And**
 19 **then I would take them from the door over to the**
 20 **side area outside of the lodge.**

21 Q. Do you recall how many people you did
 22 that for?

23 A. **How many people I dragged out?**

24 Q. After the ceremony was over.

25 A. **All together?**

1 Q. After the ceremony was over how many you
 2 dragged out from the front.

3 A. **Well, I dragged out at least four that**
 4 **were passed out. I assisted in carrying other**
 5 **people out that -- you know -- just couldn't get**
 6 **their legs to move or -- you know -- they**
 7 **weren't -- yeah. They couldn't get their body to**
 8 **move, so we'd help them out. I mean, they weren't**
 9 **passed out, but they couldn't move.**

10 Q. For the four people that were passed out,
 11 do you recall if they were male or female?

12 A. No.

13 Q. And where did you take those four people?

14 A. **To the side -- the area of the tarps.**

15 Q. Was anybody helping you drag out those
 16 people?

17 A. **Ted and Sarah.**

18 Q. Are you able to drag out somebody on your
 19 own without assistance?

20 A. **It depends on how big they are.**
 21 **Sometimes yes.**

22 Q. Were there some that you could not drag
 23 out on your own?

24 A. Yes.

25 Q. After assisting the people, that you've

1 just described for the jury, out of the front, what
 2 did you do?

3 A. **I looked inside.**

4 Q. Why did you look inside?

5 A. **I don't know. Something made me look**
 6 **inside.**

7 Q. And I'm going to put back up on the
 8 overhead Exhibit 319. When -- are you able to see
 9 inside when the door is opened?

10 A. **You can see a little bit more than this.**
 11 **Like, if the camera was directly in front -- you**
 12 **know -- you can see that -- you know -- this**
 13 **general area directly in. But that's all you can**
 14 **see.**

15 **I mean, when the door was open, I put my**
 16 **head -- after the lodge I put my head inside, and I**
 17 **could see three people in there.**

18 Q. Ms. Mercer, how much time would you say
 19 had passed from the end of that ceremony to the
 20 time that you looked inside and saw three people?

21 A. **15 minutes.**

22 Q. 15 minutes. And during that 15 minutes
 23 what was going on?

24 A. **We were getting other people out. The**
 25 **lodge was emptying.**

1 Q. Did you observe Mr. Ray during those 15
2 minutes?

3 A. He went and sat in a chair and stayed
4 there.

5 Q. When you looked in, then tell the jury
6 what you saw.

7 A. I saw three people in the back of the
8 sweat lodge laying there.

9 Q. I'm going to put back up the diagram.
10 Show the jury where you saw people.

11 A. I saw two people here and one person
12 here.

13 Q. What did you then do?

14 A. I was kneeling down, and I looked around
15 for someone to help because I knew I couldn't go in
16 the lodge bending over and drag them out. So I
17 looked for someone to help me.

18 Q. How did you look for someone to help you?

19 A. I turned my head and looked around.

20 Q. Did you find anybody?

21 A. Everyone I saw was helping someone else.
22 So -- and I looked over and I saw James Ray. And I
23 said, there's three people in there. I need to get
24 them out. Can I -- I said, I can't get in there.
25 I'm going to open the back.

1 Q. Did Mr. Ray respond to you?

2 A. Yes, he did.

3 Q. I'm going to put back up Exhibit 145.
4 Just show the jury the area where Mr. Ray was
5 seated when you spoke to him.

6 A. It's not in the picture.

7 Q. And will you just indicate what side it
8 is.

9 A. Over here. There was a canopy, a shaded
10 canopy, set up with chairs. And he was sitting in
11 the chair in the shade out of the sacred space.

12 Q. When you told Mr. Ray you were going to
13 open up the back, what did he -- did he respond to
14 you?

15 A. Yes, he did.

16 Q. And what did he say?

17 A. He said, no, unless it's absolutely
18 necessary.

19 And I said, I can't get in there. And so
20 I went around to the back.

21 Q. And then what did you do?

22 A. I lifted up the -- the -- lifted up the
23 back covers of the lodge.

24 Q. And on the photograph we now have on the
25 overhead, can you just show the jury the direction

1 where you lifted.

2 A. I ran around the back here, and I lifted
3 on the backside, right here on the back.

4 Q. And then what happened?

5 A. Well, it's hard to get -- in the
6 construction of the sweat lodge, you put blankets
7 on top of each other and then tarps. So you can't
8 just lift it up and the whole thing is exposed.
9 You lift one and there's another layer and another
10 layer, and they're around it. So it doesn't come
11 up easily. And the rocks are holding the tarps
12 down.

13 So I had to move the rocks out of the way
14 and attempt to pull the tarp and the blankets up.
15 And I couldn't do it myself, so I started -- I
16 called for help.

17 Q. And what did you say when you called for
18 help?

19 A. I was screaming, help.

20 Q. Did somebody come to help you?

21 A. My daughter was with me.

22 Q. And that's Sarah?

23 And then what did you and Sarah do?

24 A. We lifted up the back of the tarps.

25 Q. And what did you see?

1 A. We saw two people laying there.

2 Q. And what did you do?

3 A. They were -- their lips were blue. Their
4 faces were white. And my daughter said, Mama,
5 they're holding hands.

6 And I said, I know. We have to get them
7 out of there.

8 And then I called for help again, and
9 somebody came over to the side and held up the
10 tarps. And Sarah and I pulled them out.

11 Q. Do you remember if they were male and
12 female?

13 A. There was one male and one female.

14 MS. POLK: Your Honor, counsel stipulates to
15 Exhibit 522.

16 THE COURT: 522 is admitted.

17 (Exhibit 522 admitted.)

18 Q. BY MS. POLK: I know this is hard.

19 A. Yeah.

20 Q. I just want to show you 522 and ask if
21 you recognize that?

22 A. Yes.

23 Q. And what do you recognize that to be?

24 A. It looks like the inside of the sweat
25 lodge where I pulled them up, where they would have

1 **been before I pulled them out.**
 2 **Q.** I'm going to put 522 on the overhead and
 3 just ask if you can show the jury -- well, tell the
 4 jury what this is.
 5 **A.** This would be where the people we saw
 6 were laying.
 7 **Q.** Does this show --
 8 **A.** Where we lifted up the tarps.
 9 **Q.** And are you able on this photograph to
 10 orient yourself as to where the people were lying?
 11 **A.** I think so.
 12 **Q.** Will you show the jury.
 13 **A.** They would have been lying here and here.
 14 **Q.** Were you and Sarah able to pull out the
 15 man and the woman?
 16 **A.** Right there we were. Yes. Those two.
 17 **Q.** And then what happened?
 18 **A.** There was another guy. And we went to
 19 get him.
 20 **Q.** Do you -- are you able to show the jury
 21 on this photograph where the other man was?
 22 **A.** It's about over here where the other
 23 light is coming through. Because we ripped the
 24 tarp open over there.
 25 **Q.** Again, from the outside?

1 **A.** Uh-huh.
 2 **Q.** And then were you able to pull that man
 3 out?
 4 **A.** No. He was too big for Sarah and I. And
 5 I don't know who helped -- I don't know who helped
 6 pull him out.
 7 **Q.** Okay. What do you remember next,
 8 Mrs. Mercer?
 9 **A.** I remember going back -- looking at the
 10 two we had pulled out. And I had put the one girl
 11 on her side, and I started screaming again. I was
 12 on this side of the tent. I remember looking over
 13 and seeing like I -- what I've seen in movies of --
 14 I felt like I was in the military and calling for
 15 medic, medic.
 16 **When you see a battlefield going on and**
 17 **everyone helping everyone else and somebody**
 18 **screaming, help me, help me, there's too much else**
 19 **going on. No one is going to come help you.**
 20 **That's how I felt. But my husband came.**
 21 **Q.** Okay.
 22 **A.** And another lady came. And I -- that's
 23 the lady I thought was the nurse. And she came
 24 over. And she looked at her, and she goes, she's
 25 not breathing.

1 **And I said, I know.**
 2 **And she said, what do we do?**
 3 **And at that same point, my husband came**
 4 **up. And he said, call 9-1-1. Call an ambulance.**
 5 **Q.** Okay. And what did you do?
 6 **A.** I -- the nurse lady said, ask Megan --
 7 ask Megan if you can call an ambulance. And I
 8 looked around for Megan, and I didn't see her right
 9 off. So I ran over to where James Ray was sitting,
 10 and I told him -- went up to him and said, there's
 11 three people not breathing. We need to call an
 12 ambulance. I need a phone. Where is Megan? You
 13 know, in panic. We need a phone. We need to call
 14 an ambulance.
 15 **Q.** Did Mr. Ray respond?
 16 **A.** Yes, he did.
 17 **Q.** What did he say?
 18 **A.** He said -- he didn't. He responded with
 19 emotion, not a word.
 20 **Q.** And so what did you do?
 21 **A.** I turned around, and I saw Amayra, the
 22 owner of the property, and my husband -- I heard
 23 him yell at her, Amayra, call an ambulance. And I
 24 saw her turn the other way and go another
 25 direction.

1 **Q.** And so what did you do?
 2 **A.** I went to call an ambulance.
 3 **Q.** Where did you go to call an ambulance?
 4 **A.** To the house I was renting at the time.
 5 **Q.** How did you get to the house?
 6 **A.** I got in the golf cart and drove over
 7 there.
 8 **Q.** You mentioned a conversation with a
 9 person that you thought was a nurse. Who was that
 10 person? Do you know her name?
 11 **A.** Uh-uh.
 12 **Q.** What -- do you recall how that person was
 13 dressed that day?
 14 **A.** They were in a Dream Team shirt.
 15 **Q.** Why did you believe that person was a
 16 nurse?
 17 **A.** I can't -- somebody told me that she was.
 18 But I couldn't tell you who told me that she was.
 19 I wasn't even sure she was actually.
 20 **Q.** How far did you go have to go to call for
 21 help -- call for an ambulance?
 22 I'm going to put up on the overhead the
 23 map of Angel Valley, which is Exhibit 140. Can you
 24 show the jury where you went.
 25 **A.** It's kind of a glary right there, but I

1 rented this house right here. And -- so I left the
2 sweat lodge and drove on the road. I went over to
3 the -- my house.

4 Q. Where you -- how did you drive? What
5 were you in?

6 A. A golf cart.

7 Q. Were you able to place a call from there?

8 A. Yeah. Once I found the phone. I
9 couldn't find the phone.

10 Q. Was it a cell phone or a landline?

11 A. No. It was a landline.

12 Q. And you placed how many calls from your
13 house?

14 A. The first call I made from my house.
15 One.

16 Q. And then what did you do?

17 A. I got in the golf cart and drove back to
18 the sweat lodge -- well, actually, the -- the
19 person on the 9-1-1 told me to go to the gate and
20 let the ambulance in. So I was heading on my way
21 to the gate, and I went back to the sweat lodge.

22 Q. Why did you go back through the sweat
23 lodge to get to the gate?

24 A. To tell Ted that an ambulance was coming.

25 Q. Show the jury. Is the gate on this map?

1 A. It's right here.

2 Q. Is the gate on the river -- on the
3 bridge?

4 A. It's on the other side. It's on the
5 other side of the river, the far side.

6 Q. And what happened when you got to the
7 gate?

8 A. Well, before I got to the -- I made
9 another phone call before I went -- got to the
10 gate.

11 Q. Where did you make the second phone call
12 from?

13 A. Somewhere in between this area here. I
14 was driving in the golf cart, and I made it on a
15 cell phone.

16 Q. Whose cell phone?

17 A. Ted's.

18 Q. Where did you get Ted's cell phone?

19 A. From my house.

20 Q. Why did you make a second -- is that a
21 second 9-1-1 call?

22 A. Yes.

23 Q. And why did you make a second call?

24 A. Because I wanted them to be sure they
25 sent more than one ambulance. I wanted them to

1 know there was more than -- they needed more than
2 one ambulance.

3 Q. Did you make another call?

4 A. Yes.

5 Q. And why did you make another call?

6 A. I think because of the guy who was
7 burned. They told me to call if anything changed.
8 Oh. And there was another person not breathing. I
9 called to say there was a third person not
10 breathing and that a guy was burned.

11 Q. Do you know if Amayra Hamilton ever
12 called 9-1-1?

13 A. I heard she did.

14 Q. Okay.

15 MS. POLK: Your Honor, at this time I'd like
16 to play for the jury Exhibit 133, the 9-1-1 calls.

17 THE COURT: Mr. Kelly?

18 MR. KELLY: Your Honor, with the understanding
19 that the second call is from Amayra Hamilton, no
20 objection.

21 THE COURT: Okay. Then 133 will be played.
22 (Exhibit 133 played.)

23 MR. KELLY: Your Honor, we believe we're going
24 to stipulate to 672.

25 THE COURT: Okay. 672.

1 MS. POLK: Your Honor, I apologize for the
2 delay. I was looking for the CD without the radio
3 traffic.

4 THE COURT: Okay.

5 MS. POLK: I'm afraid I'm going to have to
6 play the whole -- that first call again.

7 Q. I apologize, Ms. Mercer.

8 THE COURT: So you stipulate, Mr. Kelly?

9 MS. POLK: Yes, Your Honor. This is
10 Exhibit 672, and the parties stipulate to its
11 admission.

12 MR. KELLY: That is correct.

13 THE COURT: Okay. 672 is admitted.
14 (Exhibit 672 admitted.)

15 Q. BY MS. POLK: Ms. Mercer, we just have
16 about five more minutes, and then we're going to
17 take the recess for the day.

18 A. Okay.

19 Q. Where was the nearest phone to the sweat
20 lodge? Do you know?

21 A. I can tell you where you the phones were.
22 I don't know what distances.

23 Q. Okay. Well, why did you go up to your
24 house to call?

25 A. I don't know.

1 Q. Did you look for a cell phone in the area
2 of the sweat lodge before you went up?
3 A. Yes.
4 Q. Did you find one?
5 A. No.
6 Q. You had testified that you weren't sure
7 that the lady was a nurse?
8 A. Right.
9 Q. Why weren't you sure?
10 A. Well, for one, I was never introduced to
11 her as a nurse. And two, her actions didn't seem
12 to me like a nurse.
13 Q. And when -- you had the conversation with
14 Mr. Ray about calling 9-1-1?
15 A. Yes.
16 Q. Do you recall that?
17 A. Yes.
18 Q. Did he say anything to you?
19 MR. KELLY: Your Honor, I'm going to object to
20 the form of the question. And it's been asked and
21 answered, I think, in the previous question.
22 THE COURT: Sustained.
23 Q. BY MS. POLK: What did you do after
24 calling 9-1-1?
25 A. I went back to the sweat lodge area to

1 notify Ted that the ambulances were on the way.
2 Q. And how long were you back at the sweat
3 lodge area that time?
4 A. I knew it would be a few minutes before
5 the ambulances would even get there and I could see
6 them coming, so I stayed there probably 10 or 15
7 minutes.
8 Q. What did you observe then?
9 A. I observed people doing CPR on the two
10 people we had pulled out and then other people
11 trying to assist other participants.
12 Q. Did you at any time after you pulled --
13 did you ever learn the -- the names of the people
14 you pulled out?
15 A. The next day.
16 Q. And what did you learn their names to be?
17 A. Kirby Brown and James Shore.
18 Q. Did you ever learn the name of the third
19 person who was inside?
20 A. Liz Neuman.
21 Q. And are you sure of that?
22 A. You mean the third person that we pulled
23 out?
24 Q. Yes.
25 A. No. I don't know who that was.

1 Q. And that third person was male or female?
2 A. It was a large male.
3 Q. During the time that you were with Kirby
4 Brown, what did you observe about her?
5 A. Her face was ashen gray. Her lips were
6 blue, and she wasn't breathing. Her chest was not
7 moving other than when the CPR was done.
8 Q. Did you ever touch her?
9 A. After I pulled her out and put her on her
10 side, I did not touch her.
11 Q. Do you know whether efforts were made to
12 cool her down?
13 A. I don't know. I -- after I pulled her
14 out and then got the other guy out, I left the
15 area. And when I came back, there was people
16 working on them, and I didn't go back to that area.
17 Q. Okay. And then the same question for
18 James Shore. Did you -- what did you observe about
19 him?
20 A. His face was gray, and his lips were
21 really blue. He wasn't moving.
22 Q. Did you ever notice any -- anything in
23 the area of James Shore's mouth?
24 A. I don't remember.
25 Q. And the same question for Kirby Brown.

1 A. I don't remember.
2 Q. Did you ever touch James Shore?
3 A. Not after pulling him out.
4 Q. And do you have any recollection when you
5 pulled James Shore out whether his skin -- how his
6 skin felt?
7 A. I just -- I grabbed his arm -- Sarah
8 grabbed one arm and I grabbed the other, and we
9 pulled. That's all.
10 Q. How did you pull Kirby Brown out?
11 A. I believe the same way. She got one arm
12 and I got the other.
13 MS. POLK: Your Honor, I see that it's 3:45.
14 Would you like me to stop?
15 THE COURT: Yes. Thank you, Ms. Polk.
16 MS. POLK: Thank you, Your Honor.
17 THE COURT: Ladies and gentlemen, we will take
18 the weekend recess at this time. Remember the
19 admonition.
20 There's a storm that's predicted for this
21 evening starting anytime, I guess. So take care.
22 I know some of you come a pretty long distance.
23 Again, remember all aspects of the
24 admonition. Take care. And we will start again
25 Tuesday, 9:15. Please be assembled at that time.

1 And, Ms. Mercer, I've reminded you
 2 several times. We've gone into the rule of
 3 exclusion. Of course, you must follow that.
 4 And we will be in recess. Thank you.
 5 (The proceedings concluded.)
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1 STATE OF ARIZONA)
 2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE
 3

4 I, Mina G Hunt, do hereby certify that I
 5 am a Certified Reporter within the State of Arizona
 6 and Certified Shorthand Reporter in California
 7 I further certify that these proceedings
 8 were taken in shorthand by me at the time and place
 9 herein set forth, and were thereafter reduced to
 10 typewritten form, and that the foregoing
 11 constitutes a true and correct transcript

12 I further certify that I am not related
 13 to, employed by, nor of counsel for any of the
 14 parties or attorneys herein, nor otherwise
 15 interested in the result of the within action

16 In witness whereof, I have affixed my
 17 signature this 19th day of April, 2011
 18
 19
 20
 21
 22

23 -----
 24 MINA G HUNT, AZ CR No 50619
 25 CA CSR No 8335


1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3
4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
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13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
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16 In witness whereof, I have affixed my
17 signature this 19th day of April, 2011.

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24 MINA G. HUNT, AZ CR No. 50619
25 CA CSR No. 8335